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I. INTRODUCTION AND METHODOLOGY

Although resistance to abrupt change is an essential characteristic of an effective property law, rules which remain intransigent in the face of obvious changes in their factual bases often frustrate the intention and expectation of property owners. In an earlier empirical study, it was argued that the policy of the law toward joint tenancy of real estate is an obstacle to realization of property owner intent.[1] This article, based on an empirical study of joint ownership of personal property, will evaluate the soundness of the law of personal property joint tenancies, in light of this intent.[2]

This article will first discuss the relevancy (or irrelevancy) of the joint tenancy law by juxtaposing the statutes and case law with empirical data on property owners' practices and attitudes. To the extent inconsistencies are revealed, suggestions will be made for improvement of the legal framework. Some of these suggestions will be in the form of recommended legislation. The study reported herein was undertaken in the belief that reliable information about the working of the law in action is an essential

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1. Hines, *Real Property Joint Tenancies: Law, Fact, and Fancy*, 51 IOWA L. REV. 582 (1966).

2. A comment about the terminology to be used is necessary. Today, the term "joint tenancy" is used by laymen and lawyers to describe a multitude of lawful co-ownership arrangements, the common characteristic of which is a right of survivorship. Measured by the technical standards applied to the estate of joint tenancy at common law, many of the modern co-ownership designs would certainly be found wanting, yet they are widely tolerated by the law. No reason appears for the exercise of greater technical care in the repeated references to these arrangements in the ensuing discussion; therefore, the term "joint tenancy" is used herein generally to denote ownership in which a survivorship right is recognized. Tenancy by the entirety is deliberately excluded from treatment. This ownership form is not recognized in Minnesota, MINN. STAT. § 500.19(1) (1967), nor in about one half of the states. *See* Huber, *Creditors' Rights in Tenancies by the Entireties*, 1 B.C. IND. & COM. L. REV. 197 (1960). Many of the problems of tenancies by the entirety in personalty are identical to those discussed herein with respect to joint tenancies. However, the differences are significant, and the decision was made to confine this article to joint tenancy, the ownership form at which the empirical research was directed.

component of research intended to generate law reform. The recommendations for improvement suggested herein are based in great measure on perceptions of reality gained from this project and from the earlier field work dealing with land transfers.

Several techniques may be employed to study property ownership and transfer patterns. Most studies in this area have relied upon systematic examination of public records.[3] While such records are adequate sources of information for discerning patterns of land transfer and testamentary disposition, the available personal property records do not sufficiently illuminate personal property ownership.[4] Because most personal property holdings are not documented, the researcher must directly contact the owners. Needless to say, such research creates problems not encountered in the examination of impersonal public and private records.

Problems facing the interviewing researcher include sampling errors which may bias his data, question ordering which may jeopardize completion of the interview, question timing which may sensitize his respondent, question phrasing which may elicit responses too broad or too narrow, coding which blurs or unduly accentuates factual distinctions and use of attitudinal scales with which the respondent cannot identify.

After several false starts and some pilot testings, what seemed to be a workable questionnaire was produced. The questions were designed to elicit detailed information about the property owner and his assets and to ascertain the ownership form in which the assets were held, the identity of co-owners, and the factors which influenced the choice of ownership form. In the summer of 1967, a team of four senior law students interviewed a group of randomly selected property owners in five Iowa coun-

3. *See, e.g.*, Hines, *A Decade of Experience Under the Iowa Water Permit System—Part One*, 7 NAT. RES. J. 499 (1967); Hines, *A Decade of Experience Under the Iowa Water Permit System—Part Two*, 8 NAT. RES J. 23 (1968); Dunham, *The Method, Process and Frequency of Wealth Transmission at Death*, 30 U. CHI. L. REV. 241 (1963); Ward & Beuscher, *The Inheritance Process in Wisconsin*, 1950 WIS. L. REV. 393; Powell & Looker, *Decedants' Estates—Illumination from Probate and Tax Records*, 30 COLO. L. REV. 919 (1930).

4. It may be possible to obtain information on property holding forms from the files of banking institutions, brokerage houses, stock transfer agents, lenders and other such repositories of title information. Obtaining access to this data may be a problem, however, since the holder regards much of it as confidential information. Courthouse records, on the other hand, are open but are not sufficiently helpful.

ties.[5] Property owner cooperation was generally excellent and the interviewers returned with 175 completed schedules. The information was coded, punched into computer cards and processed through the use of a simple tabulation and correlation program run on an IBM 360 computer. The results will be presented in tabular form in the appendices.

While the results of the study are generally reinforced by external evidence,[6] they are of limited scientific reliability. The modest size of the sample combined with the large number of variables produces many categories but relatively few entries. Thus, the accuracy of the results cannot be statistically assured. Two other factors may also limit the data's reliability. First, self-selection played a major role in the group sampled.[7] Second, the question-answer method of determining the ownership form has an inherent hearsay quality. What is reported is the ownership form under which the respondents *said* their property was held. Verification of their opinions was not practical. However, to the extent the ensuing discussion turns on questions of what property owners intend, the evidence collected is perhaps more probative than official records would be.

II. THE LAW-FACT GAP

Although joint tenancy was originally regarded as an ownership form limited to real estate, personal property joint tenancies were recognized fairly early.[8] The early common law favored joint tenancy ownership of land and also, so it seems,

5. The five counties surveyed were Bremer, Humboldt, Guthrie, Shelby and Johnson. Credit should be given to the following researchers who assisted so ably in the collection of data: Greg Carlson, currently assistant to the Attorney General of Minnesota; Philip Boelter, now an associate with Dorsey, Marquart, Windhorst, West & Halladay in Minneapolis, Minnesota; Forest Evashevski, Jr., now an associate with Shuttleworth & Ingersoll in Cedar Rapids, Iowa and Richard Howes, now an associate with Dickinson, Throckmorton, Parker, Mannheimer & Raife in Des Moines, Iowa.

6. Statements describing the popularity of joint tenancy ownership abound in the cases and in the legal literature. *See, e.g.*, O'Brien v. Biegger, 233 Iowa 1179, 1189, 11 N.W.2d 412, 417 (1943); Palmer v. Flint, 156 Me. 103, 112, 161 A.2d 837, 842 (1960); Riecker, *Joint Tenancy: The Estate Lawyer's Continuing Burden*, 64 MICH. L. REV. 801 (1966); Townsend, *Creation of Joint Rights Between Husband and Wife in Personal Property: I*, 52 MICH. L. REV. 779 (1954).

7. It should be noted that the sample may be biased by the fact that the selection of interviewees was made initially from a population of all real estate grantees in the five counties during 1964. Thus, the sample includes only persons owning at least one parcel of real estate.

8. *See* Townsend, *supra* note 6, at 786-92.

of tangible personalty.[9] A century ago, however, the courts began to express strong disapproval of survivorship arrangements.[10] This judicial change of heart was in response, directly or indirectly, to statutes enacted in almost every state purporting to abolish or limit the use of joint tenancy.[11] The legislative stance was probably based on the belief that survivorship was repugnant to the desires of property owners.[12]

It is difficult to square this rationale with the fact that millions of Americans annually go to some lengths to assure that their ownership arrangements include a survivorship provision.[13] Empirical studies are hardly necessary to substantiate the popu-

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9. Swenson & Degnan, *Severance of Joint Tenancies*, 38 MINN. L. REV 446, 479 (1954), *citing* Co. LITT. §§ 281-82 (Wambaugh trans. 1903); Co. LITT. *182a. Coke notes an exception as to the goods, including "debts," of joint merchants. *See also* J. WILLIAMS, PERSONAL PROPERTY 520 (18th ed. 1926). Note, *Joint Tenancy in Wisconsin Especially as Regards Personal Property*, 1955 WIS. L. REV. 154, 164.

10. *See, e.g.*, Hoffman v. Stigers, 28 Iowa 302, 307 (1869), where the court stated:

> With us, therefore, when the estate is held by two or more, not as trustees, but in their own right, nothing being expressed to the contrary, the tenancy would be in common. And thus most plainly and authoritatively is the estate of joint tenancy disfavored by our law. There is no reason, no necessity, for such an estate, except under the most peculiar circumstances. . . . And as *now we* in most of the States condemn entailments, or perpetuities, so we do and should joint tenancies, or at least their common-law incident—the right of survivorship.

See generally J. WILLIAMS, *supra* note 9, at 522 and Swenson & Degnan, *supra* note 9, at 468.

11. Assuming joint tenancy was originally the preferred construction in both realty and personalty, the reasons underlying the two preferences were quite different. Joint tenancy of real estate was initially advantageous to the English nobility in facilitating collection of feudal incidents. After the invention of the enfeoffment to use, the estate was employed by landowners to avoid imposition of incidents. *See* 2 AMERICAN LAW OF PROPERTY § 6.1 (A. Casner ed. 1952); 4 W. HOLDSWORTH, HISTORY OF ENGLISH LAW 446 (1924). Joint tenancy of tangible personalty, on the other hand, was favored on the more practical ground that it avoided difficult problems of dividing up assets not readily divisible. *In re* Levy's Will, 234 Wis. 31, 289 N.W. 666 (1940). Because of this dichotomy, it is not surprising to see occasional arguments that current legislative and judicial disfavor of survivorship rights should be limited to real property co-ownerships. *See* Note, *supra* note 9, at 158-66.

12. *See* York v. Stone, 1 Salk. 158, 91 Eng. Rep. 146 (Ch. 1709); Edwards v. Commissioner, 102 F.2d 757 (10th Cir. 1939); Hoyt v. Winstanley, 221 Mich. 515, 191 N.W. 213 (1922); Montgomery v. Keystone Sav. & Loan Ass'n, 150 Pa. Super. 577, 29 A.2d 203 (1942).

13. *See* Bloom, *Joint Tenancy: Can It Work For You?* READER'S DIGEST, Oct. 1967, at 163; U.S. TREAS. DEP'T, STATISTICS OF INCOME FOR 1949 (Part I) 352-53 (1954).

larity of joint tenancy, but a glance at the data collected illustrates the variety[14] and value[15] of property subject to survivorship, and the dispersion of its use among age groups[16] and occupation types.[17] So deeply entrenched is the joint and survivor holding form in the ownership of some types of property that it is unhesitatingly adopted by most laymen and many lawyers.[18] The frequent and forceful warnings by legal writers[19] and family lawyers[20] against careless use of joint tenancy have been ineffective to stem the tide. Reason suggests that an ownership form that abounds in spite of disapproval by the law and the disfavor of legal advisors must be more harmonious with property owners' desires than repugnant to them. The swing of the property law pendulum is supposed to trail movements in ownership preferences, but wondrous forces of inertia must be at work to cause the astonishing lag in the joint tenancy area.

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14. *See* Appendix I. Data were collected concerning 33 categories of property. The categories were developed from experience gained in pre-tests of the interview schedule. As might have been expected, joint tenancy is used most often in the ownership of the family home, the home farm, bank accounts, bonds and stock. The relatively high frequency of joint tenancy ownership of such items as household goods and many types of real estate is somewhat surprising.

15. *See* Appendix II. As might be expected, the proportion of joint tenancy ownership is generally highest at the low value ranges and lowest at the high ranges. The incidence does, however, remain surprisingly high in the $20,000-$80,000 range. At $60,000, federal tax factors making joint tenancy disadvantageous begin to operate, yet almost 50 percent of the property items over that value were held in joint tenancy.

16. *See* Appendix III. The range of disparity in joint ownership usage between age groups is small. Although it might have been expected that the young owner was responsible for the relatively recent surge in popularity of joint tenancy, this does not appear to be the case.

17. *See* Appendix IV. If joint tenancy is truly the "poor man's will," it would be expected to enjoy a wider usage among lower income occupation types than higher income owners and be more frequently employed for low value property than for high. *See* Appendix II. In neither case, however, are the differences so great as to suggest a meaningful pattern.

18. Harl, *Estate and Business Planning for Farmers*, 19 HAST. L.J. 271 (1968); Hines, *supra* note 1, at 595.

19. *See* Riecker, *supra* note 6; Stacey, *Joint Tenancy and Estate Planning*, 37 WASH. L. REV. 44 (1962); Young, *Tax Incidents of Joint Ownership*, 1959 U. ILL. L.F. 972.

20. *See* Appendix V. Information was collected on the sources of influence affecting property owners' selection of ownership form. Attorneys influenced the choice of joint tenancies in about the same number of instances as did bankers, the other major source of influence. But note that attorney advice was also reported in most instances of tenancies in common.

The question is thus raised as to why the law has not been more responsive to popular repudiation of these legal assumptions. The most common hypothesis is that the courts have sufficiently ameliorated the policy of disfavoring survivorship so as to make joint tenancy serviceable to the needs of the average property owner. The following discussion will endeavor to disclose both the support for, and the arguments against, this theory.

The legal problems raised by attempts to subject personal property to joint tenancy ownership generally fall into two categories. One set of questions concerns the nature and quantum of proof required to sustain a finding that a joint tenancy was created; the other concerns the consequences of creation both to co-owners and to third parties. In considering both matters, the reader should question whether present legal principles adequately serve those who use the joint tenancy.

A. Creation

Traditionally, the creation of a joint tenancy in any property required the conjunction of the "four unities"—time, title, interest and possession.[21] Thus, the co-owners must have received the same quantum and duration of interest and right to possession by the same transfer instrument at the same time. In relation to real estate ownership, the four unities standard for judging the validity of an attempted creation of a co-ownership with survivorship rights has been slowly eroded.[22] It is, however, still important in some jurisdictions.[23]

The statutes reversing the common-law presumption favoring joint tenancy often provided that a co-ownership would be deemed a tenancy in common unless a contrary intent was expressed.[24] Courts in a number of states have held that, as to joint tenancies, this provision eliminates the four unities re-

21. 2 Blackstone, Commentaries 180-84, (15th ed. 1809). *See generally* C. Moynihan, Introduction to the Law of Real Property 217 (1962); 2 H. Tiffany, Real Property § 418 (3d ed. 1939).

22. *See* Hines, *supra* note 1; 4 G. Thompson, Real Property § 1777 (1968 Supp.).

23. *See, e.g.*, Smith v. Tang, 100 Ariz. 196, 412 P.2d 697 (1966); Simonich v. Wilt, 197 Kan. 417, 417 P.2d 139 (1966); *In re* Estate of Ogier, 175 Neb. 883, 125 N.W.2d 68 (1963).

24. *See* Ark. Stat. Ann. § 50-411 (1947); Del. Code Ann. § 701 (1953); Fla. Stat. Ann. § 689.15 (1969); Idaho Code Ann. § 55-104 (1947); Iowa Code Ann. § 557.15 (1950); Mass. Gen. Laws Ann. ch. 184, § 7 (1958); Mont. Rev. Codes Ann. § 67-313 (1947); N.H. Rev. Stat. Ann. § 477:18 (1955).

quirement in favor of a statutory standard of intent.[25] The four unities test has thus been almost totally abandoned. Little uniformity in the inclusion of personal property is found among general statutes restricting joint tenancies. Some statutes refer only to real estate co-ownerships,[26] some speak broadly enough to fairly include both types,[27] and a number specifically include personal property.[28] Nevertheless, through statutory construction or judicial fiat, the policy against survivorship arrangements has generally been applied to co-ownerships of personal property as well as to those of real estate.

Six states expressly exempt husband and wife co-ownerships from the statutory presumption against joint tenancy.[29] As the data show, husband and wife joint tenancies account for the great majority of personal property co-ownerships.[30] These

25. *See, e.g.*, Florida Nat'l Bank v. Gann, 101 So. 2d 579 (Fla. Dist. Ct. App. 1958); Switzer v. Pratt, 237 Iowa 788, 23 N.W.2d 837 (1946); Haynes v. Barker, 239 S.W.2d 996 (Ky. Dist. Ct. App. 1951).

26. ARIZ. REV. STAT. § 33-431 (1956); COLO. REV. STAT. ANN. § 118-2-1 (1963); DEL. CODE ANN. § 701 (1950); MASS. GEN. LAWS ANN. ch. § 7 (1958); MINN. STAT. § 500.19 (1967); MO. REV. STAT. § 442.450 (1949); N.H. REV. STAT. ANN. § 477.18 (1968); N.M. STAT. ANN. 70-1-14 (1953); ORE. REV. STAT. § 93.020 (1968); UTAH CODE ANN. § 57-1-5 (1953); VT. STAT. ANN. tit. 27, § 2 (1967).

27. ALA. CODE tit. 47, § 19 (1958); IOWA CODE ANN. § 557.15 (1950); MD. ANN. CODE art. 50, § 9 (1957); MONT. REV. CODES ANN. §§ 67-313, 67-308, 67-310 (1947); N.J. STAT. ANN. § 46-3-17 (1940); N.Y. ESTATE, POWERS AND TRUSTS LAW, § 6-2.21 (McKinney 1967); N.D. CENT. CODE § 47-02-06 (1960); PA. STAT. ANN. tit. 20, § 121 (1950); 5 S.C. CODE ANN. § 19-55 (1962).

28. ALAS. STAT. § 34.15.130 (1962) (joint tenancy abolished with the exception of interests in personalty and tenancy by the entirety); ARK. STAT. ANN. § 61-114 (1947); CAL. CIV. CODE § 683 (West 1954); D.C. CODE ANN. §§ 45-816, 45-823 (1968); FLA. STAT. ANN. § 689.15 (1969); GA. CODE ANN. §§ 85-104, 85-1002 (1955); IDAHO CODE ANN. §§ 55-104, 55-508 (1948); ILL. ANN. STAT. ch. 76, § 2.1 (Smith-Hurd 1966); IND. STAT. ANN. § 51-104 (1964); KAN. STAT. ANN. § 58-501 (1964); KY. REV. STAT. §§ 381.120, 381.130 (1953); ME. REV. STAT. ANN. tit. 33, §§ 160, 901 (1965); MICH. COMP. LAWS ANN. § 557.157 (1967) (as to certain classes of personal property, gift is presumed); NEV. REV. STAT. § 111.065 (1967); N.C. GEN. STAT. § 41-2 (1966); OKLA. STAT. ANN. tit. 60, § 74 (1963); R.I. GEN. LAWS ANN. § 34-3-1 (1957); TENN. CODE ANN. § 64-107 (1955); TEX. CIV. STAT. ANN. ch. 2, § 46 (Vernon 1956); VA. CODE ANN. §§ 55-20, 55-21 (1969); WASH. REV. CODE ANN. § 64.28.010 (1966); W. VA. CODE ANN. §§ 36-1-19, 36-1-20 (1966); WIS. STAT. ANN. § 230.45 (1957); WYO. STAT. ANN. § 34-40.1 (1969 Supp.).

29. ARIZ. REV. STAT. ANN. § 33-431 (1956); IND. STAT. ANN. § 56-112 (1962); MICH. COMP. LAWS ANN. § 557.151 (1967); MO. REV. STAT. § 442.450 (1952); VT. STAT. ANN. tit. 27, § 2 (1967); WIS. STAT. ANN. § 230.45 (1957).

30. *See* Appendix VI. Information collected from the land records in an earlier study indicated that 87 percent of all transfers of real

facts are noted at this juncture simply to alert the reader to the possibility of either tailoring the general law to fit the needs of the most frequent user of joint tenancy or treating husband and wife co-ownerships separately. As will be discussed later, the preponderance of joint and survivor holdings between spouses makes irrelevant many of the conventional rationales for disapproving joint tenancy.[31]

The great variety of personal property forms precludes the postulation of a test more specific than the intent standard for determining whether joint tenancy has been created. For some types of personal property co-ownerships, notably bank accounts, it might be questioned whether even the concept of intent is sufficient. A review of the decisions suggests that the more solid and tangible the property, the more likely the court will invoke relatively stringent requirements for a finding of joint tenancy. As the property interests in issue become more abstract and uncertain, the courts turn away from the old learning and seek to sustain survivorship rights on less conventional bases. Due to this judicial tendency to approach joint tenancy issues from a standpoint that seems related to the mass of the property involved, the following discussion treats tangible and intangible personalty separately. Empirical data are reported and considered in conjunction with the legal materials in each of the specific topics explored.

1. *Tangible Personalty*

Remarkably little law exists concerning either the requirements for the creation of a joint tenancy in tangible personal property or the ramifications of such ownership. It has long been generally accepted that tangible items of personal property may be jointly owned and that the co-ownership may be made subject to survivorship rights.[32] Questions concerning the validity of attempts to create joint tenancy in tangible personalty are often decided by analogy to real estate joint tenancies.[33] This analysis is helpful in some cases, particularly those involv-

property to co-owners were to husband and wife joint tenants. *See* Hines, *supra* note 1, at 617. In the current study, husband and wife co-ownership of personalty was found to be equally pervasive. *See* Appendix V.

31. *See* text accompanying notes 205-09 *infra*.

32. *See, e.g.*, 2 AMERICAN LAW OF PROPERTY § 64 (A. Casner ed. 1952) and Townsend, *supra* note 6.

33. *See In re* Estate of Miller, 248 Iowa 19, 23-24, 79 N.W.2d 315, 319 (1956); Note, *supra* note 9, at 157.

ing some form of transfer instrument or title document, but leaves much to be desired when applied to the large number of chattels where casual and informal ownership is the norm. Recognizing that it would be folly to attempt to resolve difficult disputes concerning ownership of such chattel through reliance on real estate law, the courts dutifully pay their respect to this impressive body of law and then seek to discern the parties' intent through careful scrutiny of the surrounding facts.[34]

Judging from the data, the three types of tangible personal property most likely to be held in joint tenancy are motor vehicles, farm chattels, and household and miscellaneous goods.[35] While motor vehicles are regularly titled in a manner that permits ready joint registration, a substantial amount of joint tenancy ownership is found in the latter two types of property, the ownership of which is usually characterized by ambigous and unwritten arrangements.

(a) Motor Vehicles

The family automobile is often held in some form of joint ownership.[36] The frequency of joint and survivor ownership seems to be relatively uninfluenced by age or occupation of the owner[37] or by the value of the automobile.[38] Automobile ownership is uniformly represented by title certificates which lend themselves to a variety of co-owner designations, the most common of which are *A and B*, *A or B*, and *A and/or B*.

Notwithstanding the large number of automobile joint ownerships, few cases litigating the effect of these ambiguous co-owner designations have been reported. The reason for the paucity of cases is not clear, but when it is observed that almost all such co-ownerships are between husband and wife,[39] it is probable that statutes facilitating the ability of a surviving spouse to obtain a new title certificate have discouraged challenges to his claim.[40] In the situations that have been reported,

34. *See* Horton v. Estate of Elmore, 420 S.W.2d 48 (Kan. City Ct. of App. 1967); Wambeke v. Hopkin, 372 P.2d 470 (Wyo. 1962).

35. *See* Appendix I.

36. *Id.* (40 percent joint tenancy ownership for first cars). The study also turned up 10 second cars of which two were held in joint tenancy.

37. *See* Appendix VII.

38. *See* Appendix VIII.

39. The field study showed 164 first automobiles of which all 78 jointly held were held between spouses.

40. *See, e.g.*, ARIZ. REV. ST. ANN. §§ 28-314(B), 28-315 (1956); ILL.

the courts have tended to construe the language in the title certificate in favor of survivorship.[41]

(b) Farm Chattels

The variety of arrangements by which personal property is held in agricultural states suggests that one common problem is the ownership of tangibles used in the family farm business. The data show that farmers report joint tenancy ownership of farm chattels with a significant degree of regularity.[42] There is a high frequency of husband and wife co-ownership,[43] but no clear pattern emerges in relation to the age of the farmer or the value of the chattel. Farmers owning land in joint tenancy

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STAT. ANN. ch. 95-½, § 3-114 (Smith-Hurd 1958); IOWA CODE ANN. § 231.47 (1966); *Cf.* note 48 *infra.*

41. For example, in Illinois, "[t]he Secretary of State does not require, for the issuance of a title certificate to one claiming as the surviving joint tenant, that the original title certificate creating the joint tenancy negate in common [*sic*]." Moss & Siebert, *Classification and Creation of Joint Interests*, 1959 U. ILL. L.F. 883, 917.

In addition, the wisdom of placing title to the family auto in joint tenancy might be questioned in some jurisdictions where a driver's negligence might be imputed to an owner-passenger. Such ownership may imperil the ability of a co-owner to recover or to defend in a personal liability suit growing out of an accident involving the jointly owned vehicle. If an injured passenger is an owner, the possibility exists that his recovery for negligence of the other driver will be barred because contributory negligence of the driver of his own car may be imputed to him. *See* Phillips v. Foster, 252 Iowa 1075, 1083, 109 N.W.2d 604, 608 (1961). Similarly, an owner-passenger may be held responsible either by statute, *e.g.*, CAL. VEHICLE CODE § 17150 (West 1960) or common law. *See* Jenks v. Veeder Contracting Co., 177 Misc. 240, 30 N.Y.S.2d 278 (Sup. Ct. 1941). In the absence of statute, ownership alone is ordinarily not a sufficient ground for the imputation of liability; some form of control over the conduct of the driver is required. *See* Sherman v. Korff, 353 Mich. 387, 91 N.W.2d 485 (1958); Parker v. McCartney, 216 Ore. 283, 338 P.2d 371 (1959); Painter v. Lingon, 193 Va. 840, 71 S.E.2d 355 (1952). However, the owner's presence in the vehicle may create a presumption of control. Matheny v. Central Motor Lines Inc., 233 N.C. 681, 65 S.E.2d 368 (1951); Emerich v. Bigsby, 231 Wis. 473, 286 N.W. 51 (1939). Where the family auto is jointly owned by two or more persons, the likelihood of the above described difficulties arising is proportionately increased.

42. *See* Appendix IX.

43. *See* Appendix X. For example, for farm trucks 11 of 12 joint tenancies were between husband and wife, for tractors 24 of 25, for machinery 16 of 17, for equipment 5 of 6, for livestock 21 of 22, and for severed crops and grain 7 of 18. The other co-ownerships reported were almost always between parent and child.

Aside from the high incidence of husband and wife joint tenancies, the most striking fact is the high number of tenancies in common with siblings. This is likely explained by partnerships between brothers, which occur fairly regularly in farming.

report a higher use of joint ownership of assets associated with the farm business than do farmers owning land individually, but the difference is small.

The high incidence of joint tenancy ownership of farms[44] would seem likely to spawn litigation to determine the ownership of chattels closely associated with the farm operation. For example, when a husband and wife hold title to the family farm as joint tenants, are such items as the livestock, feed and machinery regarded as subject to the survivorship rights in the farm or is their ownership independently determined? Similar questions may arise in regard to an informal father and son farm partnership or in other family arrangements. The few cases involving farm chattels, however, provide little insight into the factors relied upon to identify joint tenancy arrangements.[45] If an issue of this nature is to be resolved on the basis of intent, close attention must be paid to the relationship of the co-owners and their past course of conduct in relation to other property. For example, inquiry could be directed to their practices in reporting income from the property or declaring ownership for property taxation and on financial statements. Where a husband and wife owned the farm in joint tenancy, there would seem to be a strong probability that they intended to extend the survivorship right to personal property closely associated with the land. Even if the land were not

44. *See* Hines, *supra* note 1, where it was reported that of all deeds transferring farms in the five counties surveyed, approximately 38 percent involved joint tenancies.

45. This is in accord with what seems to have been the general rule that ownership of the personal property is presumed to be in the husband and not the wife where husband and wife live together in the same house and on the same real estate. *See* Rhoads v. Gordon, 38 Pa. 277 (1861). Knox v. Trimble, 324 S.W.2d 130 (Ky. 1959) is in accord, but the court notes that there is a modern tendency to modify the general rule. *Id.* at 131. Although not cited in *Knox*, the modification referred to may be Hill's Executor v. Young, 157 Ky. 42, 162 S.W. 558 (1914), where income derived from a jointly owned and managed farm and other real property was found to be jointly owned. More recent authority, albeit meager, indicates that a pattern of ownership as to other items is relevant. In Vaughn v. Borland, 234 Ala. 414, 175 So. 367 (1937), joint possession was found to raise a presumption of joint ownership with right of survivorship. In Block v. Schmidt, 296 Mich. 610, 617-18, 296 N.W. 698, 701 (1941), ownership of realty was deemed "quite persuasive" as to the nature of the ownership of personalty. *See generally* Annot. 111 A.L.R. 1374 (1937) and Effland, *Estate Planning: Co-ownership*, 1958 WIS. L. REV. 507, 522-25. *See also In re* Ebdon, 198 Misc. 531, 98 N.Y.S.2d 697 (Sur. Ct., Jefferson Co. 1950) (where livestock is held in joint tenancy, offspring will be deemed jointly held). *See also* note 49 *infra.*

jointly owned, a pattern of holding other personalty in joint tenancy should be persuasive evidence for finding a survivorship right in the chattels, at least as between farm spouses. In joint tenancies between persons other than husband and wife, the intent is not so easily inferred from the parties' relationship; therefore, the difficulty of proving joint tenancy should be substantially greater. Where the effect of finding a joint tenancy would be to cut out natural objects of the deceased's bounty, a very strong showing of intent to create joint tenancy ought to be required.

(c) Household and Miscellaneous Goods

The data reveal a substantial amount of joint tenancy ownership of household goods and other items ordinarily found in and around the home.[46] In the sense that these assets are likely to take on the ownership coloration of the home itself, they share many of the qualities of the farm chattels discussed above. Given the high incidence of joint tenancy ownership of the family home, it is natural for the co-owners to believe and intend that items of personal property closely associated with the home are held in the same manner. Although it is unlikely that any reliable documentation exists, to the extent that ownership turns on intent, it seems that the owners' understanding of the ownership arrangement is legally correct. While, as with other personalty, it could be difficult to prove to the satisfaction of a court the existence of an intent which was never articulated, the consistent pattern of husband and wife co-ownership[47] would seem to reinforce the probability of this intent. The likelihood that such an intent did indeed exist must strongly repress the cupidity of potential contestants because the survivor's claim of ownership to household goods is almost never challenged.[48] In the few cases that have arisen, the courts have emphasized the probability of a survivorship intent growing out of the manner in which other property was held.[49]

46. *See* Appendix I.

47. *See* Appendix XI.

48. Another explanation might be that the items of property are of insufficient value to spark a dispute. Most respondents valued their household effects at between $1000 and $3000. *See* Appendix XII. In most states such items are awarded to the surviving spouse as exempt personalty.

49. The general rule, as with farm chattels, appears to be that "personal property in the joint possession of husband and wife, or concerning which there is no independent evidence as to which of them is

2. *Intangibles*

Discovering and analyzing the law of joint tenancy as it relates to intangible personalty involves considerations different from those applicable to tangibles. A primary difference is that unlike tangibles, interests in intangibles are almost always evidenced by some instrument of title or transfer. Therefore, most disputes involve efforts to construe or vary the language of a writing. In addition, the cases are much more numerous, especially in regard to bank accounts.

(a) Corporate Securities

Over half the stocks and other corporate securities reported in the field study were held jointly.[50] Nearly all joint tenants were spouses,[51] but no clear patterns emerged as to the owners' ages or occupations, or the value of the stock.[52]

Both article eight of the Uniform Commercial Code[53] and the rules of the major stock exchanges[54] defer to local law on the effect of registration of securities in a joint and survivorship form, and, as might be expected, local law varies greatly. A number of states have statutes protecting corporations which recognize survivorship among shareholders.[55] Several states

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in possession, is presumed to belong to the husband." Blanpied's Estate v. Robinson, 155 Colo. 133, 145, 393 P.2d 355, 361 (1964). *Cf.* Dura Seal Prod. Co. v. Carver, 186 Pa. Super. 425, 427, 140 A.2d 844, 845 (1958) wherein it is noted, *quoting In re* King's Estate, 387 Pa. 119, 127, 126 A.2d 463, 467 (1956), that a wife could overcome the presumption "by evidence that she paid for or inherited the furnitures [*sic*] or acquired it by gift, or that they jointly paid for it, or by any other evidence sufficient to prove ownership." A more realistic approach was taken in Hutchins v. Hutchins, 113 So. 2d 412 (Fla. 1959) where the court found a presumption that property, real and personal, purchased by a husband was intended as a gift to the wife so that she became a joint tenant therein and had a property interest which required protection at the time of a divorce. *See generally* Annot., 111 A.L.R. 1374 (1937) and 41 C.J.S. *Husband and Wife* § 273(b) (1944).

50. *See* Appendix VIII.

51. *See* Appendix XIII.

52. *See* Appendix XIV. The value figures are the most interesting of the group. Joint tenancy ownership does tail off in the higher value ranges, as estate planners suggest it should, but the number of high value stocks is too small to be significant.

53. *E.g.*, MINN. STAT. ch. 336, art. 8 (1967).

54. The only provisions relating to joint ownership of securities found in the rules of the New York Stock Exchange concern standardized abbreviations of joint tenancy holding forms. N.Y.S.E. COMPANY MANUAL § A-12, at A-214.

55. *See, e.g.*, ARIZ. REV. STAT. ANN. § 10-175 (1956); CAL. CORP. CODE § 2414 (West 1955); ILL. STAT. ANN. ch. 76, § 2(b) (Smith-Hurd

have statutes specificially providing for the creation of joint tenancies in stocks.[56] One state has recently enacted legislation expressly covering the incidents of joint ownership of corporate securities.[57] In the absence of legislative guidance, the courts continue to divide over such questions as whether a valid delivery is required to create a joint tenancy in stock,[58] and whether the four unities must exist before a valid joint tenancy is recognized.[59] Fortunately, the courts show no propensity to distinguish among different types of corporate securities; debentures, bonds, common and preferred stock all seem to be treated similarly.

It is interesting to speculate on the degree to which the practices of brokerage houses and transfer agents affect property owners' decisions in the creation of stock co-ownerships. Large brokerage firms typically rely on highly standardized form agreements which offer the option of creating what is designated as a "joint registration."[60] Unless specifically directed otherwise, stock purchased on behalf of an account holder will be registered in the same fashion as the account. The account agreement form generally does not specify the incidents of the joint account; some firms, however, explain to customers that it creates

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1966); REV. CODE OF WASH. ANN. § 23A.08.320 (1969). *Cf.* TEX. CODES ANN. (Bus. & Comm.) § 8.207 (Vernon 1968), *replacing* TEX. CIV. STAT. ANN. art. 1302-6.04 (Vernon 1962).

56. COLO. REV. STAT. ANN. § 76-1-5 (1964); ILL. STAT. ANN. ch. 76, § 2(b) (Smith-Hurd 1966); MICH. COMP. LAWS ANN. § 557.151 (1967); N.C. GEN. STAT. § 25-8-407 (Supp. 1967).

57. N.C. GEN. STAT. § 25-8-407 (Supp. 1967). *See also* Edwards & Wood, *Joint Ownership of Corporate Securities in North Carolina Revisited*, 46 N.C.L. REV. 520 (1968).

58. *See* Allender v. Allender, 199 Md. 541, 87 A.2d 608 (1952) (possession by one joint tenant is possession by both). *See also* Bunt v. Fairbanks, 81 S.D. 255, 134 N.W.2d 1 (1965). The court in *In re* Hutchison's Estate, 120 Ohio St. 542, 166 N.E. 687 (1929) stated that the fact that the certificate was in the possession and custody of one joint tenant is "relatively unimportant." "It was little more than a 'scrap of paper.' It might have been lost or destroyed, but the records of the corporation would still have disclosed their joint ownership and right of survivorship." *Id.* at 548, 166 N.E. at 689. *But see* Buffaloe v. Barnes, 226 N.C. 313, 38 S.E.2d 222, *rehearing denied*, 226 N.C. 779, 39 S.E.2d 599 (1946).

59. *Compare* Petri v. Rhein, 257 F.2d 268 (7th Cir. 1958) (four unities not required), *with* Kuebler v. Kuebler, 131 So. 2d 211 (Fla. 1961) (four unities required). *See also* Crook v. Crook, 184 Cal. App. 2d 745, 7 Cal. Rptr. 892 (1960).

60. The larger brokerage firms utilize computer equipment; thus, the account form is a rather spartan single page document with numerous boxes to be checked.

a survivorship right.[61] Where stock is *registered* in the names of the account owners as joint tenants, survivorship is assured, but where the stock is held in street name, it might be questioned whether the broker's representation will prove accurate in the many jurisdictions where co-ownerships are presumed to be tenancies in common. Uncertainties in the effect of brokerage joint accounts could be substantially eliminated by subjecting such accounts to the same principles that are applied to joint accounts in other financial institutions.[62]

The transfer agent might significantly influence the type of holding by his handling of requests for joint registration of securities. In dealing with stock transferred through brokers, the transfer agent is likely to receive very routine instructions regarding registration; but what about the frequent transfer requests he receives from private parties? Does he exercise some control over the manner in which ambiguous plural ownerships are registered? If so, has he developed his own guidelines for categorizing unclear co-ownerships or does he request clarification from the parties? What evidence there is suggests that so long as the stockholders' taxpayer numbers are reported, transfer agents tend to register the securities in whatever form the parties request.[63] Local legislation sustaining the validity of the joint and survivorship form for holding title to all types of personal property and clarifying the language necessary to accomplish this result should suffice to remedy any problems encountered by transfer agents in registering jointly owned securities.[64]

(b) Contract Rights and Mortgages

The data suggest that contract rights are uncommon assets, and the use of joint tenancy is insubstantial.[65] The paucity of

61. Interview with Clark F. Mighell, White & Co. in Iowa City, Iowa, Sept. 19, 1969.

62. *See* recommendations in text accompanying notes 215-24, *infra.*

63. For a discussion of the problems faced by transfer agents because of uncertain joint tenancy laws, *see* Orgain, *The Texas Joint Tenancy in Corporate Shares: Problems of the Stock Transfer Agent,* 16 BAYLOR L. REV. 99 (1964).

64. *See* recommendations in text accompanying notes 205-14, *infra.* In the alternative, a special statute governing joint ownership of corporate securities should be considered. *See* N.C. GEN. STAT. § 25-8-407 (Supp. 1967).

65. Only 17 cases of contract right ownerships were found. Of these, six were held in joint tenancy. *See* Appendix I.

cases in this area would seem to reinforce the inference drawn from the data. The two types of contract rights most likely to be held in joint tenancy are real estate mortgage notes and land contracts. Notwithstanding the fact that both these contracts involve a security interest in real estate, under well established equitable principles the interest of the mortgagee and the contract vendor are personal property rights.[66] Because both of these contract rights often arise as the result of the lender's transfer of real estate on credit, the high incidence of joint tenancy in real estate titles makes it likely that the lender's former holding has been carried forward into the secured contract right. In several states, joint tenants who sell real estate by land contract and intend to continue the survivorship right in the proceeds may be frustrated by a perverse rule that such a sale severs the joint tenancy.[67]

The requirements for creation of survivorship rights in the benefits of contracts are a matter of widespread uncertainty. The statutes of a few states expressly exclude certain types of contracts from their general presumption against joint tenancy.[68] Other states have special statutes governing the creation of joint and survivor ownerships in contractual obligations.[69] These statutes are generally held to be supplemental to the common law rules for creating joint tenancy.[70] In most states, however, the only guidance for the creation of survivorship rights is to be derived from the local court's attitude toward joint tenancies in personalty. Where compliance with the common law formalities is insisted upon, the contract itself should contain the requisite language, though courts which use the intent standard will probably recognize agreements external to the instrument.[71]

66. *See generally* A. CASNER & W. LEACH, CASES AND TEXT ON PROPERTY 648, 649 (1st Std. ed. 1950); W. WALSH, EQUITY 415-54 (1930).

67. *In re* Estate of Baker, 247 Iowa 1380, 78 N.W.2d 863 (1956); Buford v. Dahlke, 158 Neb. 39, 62 N.W.2d 252 (1954). *See also* Swenson & Degnan, *Severance of Joint Tenancies*, 38 MINN. L. REV. 466, 476 (1954).

68. *See, e.g.*, MICH. COMP. LAWS ANN. § 557.151 (1967); WIS. STAT. ANN. § 230.45 (1957).

69. *See, e.g.*, CAL. CIV. CODE § 683 (West 1954); ILL. STAT. ANN. ch. 76, § 2 (Smith-Hurd 1966); MICH. COMP. LAWS ANN. § 557.151 (1967).

70. *See* Illinois Public Aid Comm'n v. Stille, 14 Ill. 2d 344, 348, 153 N.E.2d 59, 61 (1958); David v. Ridgely-Farmers Safe Deposit Co., 342 Ill. App. 96, 110, 95 N.E.2d 725, 732 (1950).

71. *Cf.*, O'Brien v. Biegger, 233 Iowa 1179, 1211, 11 N.W.2d 412, 427

(c) Safety Deposit Boxes

Nearly half the respondents reported ownership of a safety deposit box, and almost all of these respondents said they owned the box in joint tenancy.[72] Rental contracts for safety deposit boxes ordinarily provide only for joint access. It is not surprising, however, that the layman would equate this arrangement to a joint tenancy where, on the death of one party, the survivor can quickly and secretly remove the contents of the box,[73] and convert any readily negotiable assets into cash. What little legal authority there is, however, does not support the respondents' belief that the survivorship right automatically affixes to each asset in the box.[74] Recognizing the act of depositing assets in a joint safety deposit box as affecting the ownership interests of the assets would indeed appear to be an undesirable policy. Every asset deposited would constitute a potential source of litigation over the true ownership intent.

(d) Government Bonds

The United States Treasury sells savings bonds which may be registered in a single type of co-ownership form, roughly equivalent to a joint tenancy with the survivorship right.[75] Among the property owners interviewed, government bonds were popular investments; the survivorship form was particularly favored. Where survivorship rights existed, the owner's

(1943); *In re* Whiteside's Estate, 159 Neb. 362, 368, 67 N.W.2d 141, 145 (1954).

72. *See* Appendix I.

73. The survivor may have to remove the assets before the institution learns of the death of the other co-tenant. In many states the bank is prohibited from delivering the contents of the safe deposit box to any person other than the estate representative after notice of the depositor's death. *See, e.g.*, CONN. GEN. STAT. ANN. § 12-382 (1960); IOWA CODE ANN. § 450.86 (1949).

74. *See, e.g.*, David v. Ridgely-Farmers Safe Deposit Co., 342 Ill. App. 96, 95 N.E.2d 725 (1950). *See also* Effland, *supra* note 45.

75. 31 C.F.R. § 315.60 (Rev. 1969): "A savings bond registered in coownership form, for example, 'John A. Jones or Mrs. Mary C. Jones,' will be paid . . . to either upon his separate request, and upon payment to him the other shall cease to have any interest in the bond." 31 C.F.R. § 315.62 (Rev. 1969) entitled *After death of one or both coowners* states: "If either coowner dies without the bond having been presented and surrendered for payment or authorized reissue, the survivor will be recognized as the sole and absolute owner. Thereafter, payment or reissue will be made as though the bond were registered in the name of the survivor alone . . . ."

spouse was the usual co-owner, but a higher proportion of parent-child joint ownerships were observed than in most other types of property.[76]

Given the varying recognition accorded joint tenancies in the several states, it is not surprising that considerable conflict once existed in the local law treatment of savings bond co-ownerships.[77] The view which has now been universally adopted reasons on a contract theory that the registration form, which incorporates by reference the regulations, constitutes a contract between the federal government and the parties to the savings bond.[78] The effect of the contract is determined by federal law to create certain rights among the parties. The supremacy clause requires that the states honor and enforce such rights, which include that of survivorship.

(e) Accounts

No type of personal property generates more litigation than accounts with financial institutions held in a joint and survivor form.[79] One reason for the high number of cases may be the

76. *See* Appendix XV. The young and old alike reported bond ownership; joint tenancy was about equally distributed among age groups, ranging from 8 out of 10 joint tenancies in the 35-39 group to 7 out of 12 in the 60-and-over category. Similarly, occupation was not a significant variable, although laborers did utilize joint tenancy holding (seven out of eight in both the skilled and unskilled categories) more than did farmers (14 out of 20) or businessmen (2 out of 5).

77. *See* Sinift v. Sinift, 229 Iowa 56, 293 N.W. 841 (1940); Slater v. Culpepper, 222 La. 962, 64 So. 2d 234 (1953); *see* Annot., 37 A.L.R. 2d 1221 (1954). Such decisions have been overruled by the United States Supreme Court's decision in Free v. Bland, 369 U.S. 663 (1962).

78. Hill v. Havens, 242 Iowa 920, 932, 48 N.W.2d 870, 877 (1951); Conrad v. Conrad, 66 Cal. App. 2d 280, 285, 152 P.2d 221, 224 (1944); Reynolds v. Reynolds, 325 Mass. 257, 90 N.E.2d 338 (1950). *See also* Note, *Joint Tenancy in Wisconsin Especially as Regards Personal Property*, 1955 WIS. L. REV. 154, 161. The only exception to complete control recognized by courts espousing this federal preemption theory is a situation in which grounds for equitable intervention exist. For example, where the co-ownership registration is proved to have been a mistake or procured through fraud or undue influence, the courts will impose a constructive trust on the surviving co-owner for the benefit of the decedent's estate. *See, e.g.*, Thorp v. Besozzi, 144 N.E.2d 430 (Ind. 1957); *In re* Chase's Estate, 348 P.2d 473, 481 (1960); Chase v. Leiter, 96 Cal. App. 2d 439, 215 P.2d 756 (1950); Olsen v. Olsen, 189 Misc. 1046, 70 N.Y.S.2d 838 (1947); *In re* Haas' Estate, 10 N.J. Super. 581, 77 A.2d 523 (1950).

79. Although the great majority of joint accounts are deposits with bank institutions, this discussion is intended to include all joint and survivor accounts. Illustrative are accounts with bank and trust companies, savings banks, buildings and loan associations, savings and loan

sheer volume of such accounts. The data from the empirical study shows that of the 175 respondents, 91 had savings accounts and time certificates and 173 had checking accounts, of which 81 percent and 89 percent respectively were reported to be held in joint and survivor form. The use of joint tenancy was not statistically related to the age of the depositors nor to their occupation.[80] A second reason for the volume of litigation may be the uncertain state of the law relating to such accounts. Much of the confusion can be attributed to the fact that after 50 years the law relating to joint accounts is still evolving.[81] Courts continue to search for a satisfactory doctrinal foundation to support results often obviously intended by the parties. Modern courts repeatedly fail, however, to give full effect to the intent of the parties since the applicable contract or property principles are fraught with technical requirements. As yet, the courts show little disposition to differentiate the several types of accounts, except as dictated by special legislation.

At least three distinct intentions other than a pure tenancy in common could motivate the creation of a joint account. One situation is where the persons intend that each co-owner is to have power to deplete the account on his own signature, with the survivor as sole owner of the balance. An example is the ordinary husband and wife joint checking or savings account.[82] A second situation is where one party desires to retain complete control over the account during his lifetime, but wants any balance to pass at his death to a person designated by him. Manifestations of this intent include joint savings accounts where the passbook is retained in the possession and control of the dominant co-owner, pay-on-death accounts, and survivorship joint accounts in which withdrawals require the signature of all living co-owners. The third situation is one in which it is intended that one person have the power to make withdrawals only for the benefit of another and that upon the

companies or associations, and credit unions. Other joint accounts are found with investment brokers and regulated investment companies.

80. As Appendix XVI shows, value of the account was similarly unrelated to joint tenancy usage; a high proportion of usage occurred at all value levels. The data on savings accounts are similar.

81. *See* Kepner, *The Joint and Survivorship Bank Account—A Concept Without a Name*, 41 CAL. L. REV. 596 (1953); Kepner, *Five More Years of the Joint Bank Account Muddle*, 26 U. CHI. L. REV. 376 (1959).

82. The data show a heavy preponderance of husband and wife co-ownership in checking accounts. Figures on savings account ownership display an even greater spousal character. *See* Appendix XVII.

other's death, the balance becomes part of his estate. Illustrative of this arrangement is the situation where an invalid parent will authorize withdrawals from his account by the child with whom he lives.[83] Unfortunately, neither banking laws nor property laws consistently facilitate the realization of these intentions, and their failure to do so regularly entraps joint account owners unaware of the effect of their acts.

A bewildering variety of rules and presumptions are currently applied to creation of joint accounts. Nearly every state has legislation affecting accounts owned in joint names. Generally, the statutes are of three types. Most state banking laws contain provisions designed primarily to safeguard financial institutions in their dealings with co-owners of accounts.[84] A few states' banking laws specifically purport to govern property rights in the accounts,[85] and they are generally accorded that effect by the courts.[86] Even without such language, however, some states interpret the former statutes as dispositive of property rights between the co-owners;[87] others rule that property rights are not affected.[88] The third type of statute is one declaring that the opening of an account in joint and survivorship

83. In effect then, the party making withdrawals for the benefit of the person who has contributed the funds does so as the agent of the second party. This agency relationship is sometimes made the basis of a decision denying the survivorship incident. *See* Mitts v. Williams, 319 Mich. 417, 29 N.W.2d 841 (1947); *In re* Kemmerer's Estate, 16 Wis. 2d 480, 114 N.W.2d 803 (1962).

84. All states except Kentucky have banking statutes of this nature. *See* Kepner, *The Joint and Survivorship Bank Account, supra* note 81, at 604.

85. ALA. CODE tit. 5, § 128(2) (1960); CONN. GEN. STAT. ANN. § 36-3 (1969); ME. REV. STAT. ANN. tit. 9, § 515 (1964); N.H. REV. STAT. ANN. § 384:28 (1955); N.J. STAT. ANN. §§ 46:37-1, 2 (Supp. 1954); VT. STAT. ANN. tit. 8, § 809 (1958).

86. Miller v. Roseberry, 144 A.2d 836 (Vt. 1958). *Cf.* Bradley v. State, 100 N.H. 232, 123 A.2d 148 (1956).

87. O'Brien v. Biegger, 233 Iowa 1179, 11 N.W.2d 412 (1943); Dyste v. Farmers and Mechanics Sav. Bank of Minneapolis, 179 Minn. 430, 229 N.W. 865 (1930); *In re* Lewis' Estate, 194 Miss. 480, 13 So. 2d 20 (1943); *In re* Johnson's Estate, 116 Neb. 686, 218 N.W. 739 (1928); Hawkins v. Thackston, 224 S.C. 445, 79 S.E.2d 714 (1954); Barbour v. The First Citizens Nat'l Bank of Watertown, 77 S.D. 106, 86 N.W.2d 526 (1957); *In re* Staver's Estate, 218 Wis. 114, 260 N.W. 655 (1935).

88. Gibson v. Industrial Bank of Wash., 36 A.2d 62 (D.C. Mun. Ct. App. 1944); Cerny v. Cerny, 152 Fla. 333, 11 So. 2d 777 (1943); Clark v. Bridges, 163 Ga. 542, 136 S.E. 444 (1927); Malone v. Sullivan, 136 Kan. 193, 14 P.2d 647 (1932); Northcott v. Livingood, 10 So. 2d 401 (La. App. 1942); Mathias v. Fowler, 124 Md. 655, 93 A. 298 (1915); New Hampshire Sav. Bank v. McMullen, 88 N.H. 123, 185 A. 158 (1936);

form creates a joint tenancy.[89] The incidents which attach to accounts opened in the prescribed statutory form are thus determined by the courts through reference to the jurisdiction's joint tenancy law.[90]

Unfortunately, different statutes in the same state will provide different techniques for creating such accounts and will set forth varying rules governing their effect.[91] The resulting variety of account contract forms confuse depositors and increase the likelihood that the parties' intent will not be realized.

Judicial attitudes toward joint accounts fall into two schools of thought. One school equates joint accounts to joint tenancies and requires compliance with restrictive technicalities as a precondition to creation of a survivorship arrangement. These cases turn on such issues as whether "*A or B*" was an adequate manifestation of intent to create a joint tenancy,[92] whether the survivorship account was a testamentary device[93] and whether a gift was completed when money was deposited in survivorship where the donee co-owner had no present right to reach the funds.[94]

Nichols v. Metropolitan Life Ins. Co., 137 Ohio St. 542, 31 N.E.2d 224 (1941); Lay v. Proctor, 147 Ore. 545, 34 P.2d 331 (1934); Peoples Sav. Bank in Providence v. Rynn, 57 R.I. 411, 190 A. 440 (1937); Pruett v. First Nat'l Bank of Temple, 175 S.W.2d 658 (Tex. Civ. App. 1943); Holt v. Bayles, 85 Utah 364, 39 P.2d 715 (1934).

89. ARK. STAT. ANN. § 67-521 (1947); CAL. FIN. CODE § 852 (West 1968); COLO. REV. STAT. ANN. § 14-3-6 (1964); MICH. COMP. LAWS ANN. § 487.703 (1968); MO. ANN. STAT. § 362.470 (1968); NEV. REV. STAT. § 663.010 (1967); N.Y. BANKING § 675 (McKinney Supp. 1969); WASH. REV. CODE ANN. § 30.20.015 (Supp. 1968); W. VA. CODE ANN. § 31-8-23 (1966).

90. *See* Powell v. Powell, 222 Ark. 918, 263 S.W.2d 708 (1954). *See generally* Kepner, *Five More Years of the Joint Bank Account Muddle, supra* note 81, at 391-94.

91. *Compare, e.g.*, IOWA CODE ANN. § 528.64 (1949), *with* IOWA CODE ANN. § 534.11 (Supp. 1969); *and* CAL. FIN. CODE § 852, *with* § 11204 *and* § 5600 (West 1968).

92. VanPelt v. West Essex Sav. & Loan Ass'n, 91 N.J. Super. 164, 219 A.2d 527 (1966); Lombardie v. First Nat'l Bank of Hancock, 23 App. Div. 2d 713, 257 N.Y.S.2d 83 (1965).

93. Jacques v. Jacques, 352 Mich. 127, 89 N.W.2d 451 (1958); Anderson v. Lewis, 342 Mich. 53, 68 N.W.2d 774 (1955); *In re* Creekmore's Estate, 1 N.Y.2d 284, 135 N.E.2d 193, 152 N.Y.S.2d 449 (1956).

94. Succession of Grigsby v. Hamilton, 219 So. 2d 832 (La. App. 1969); Crowell v. Milligan, 157 Neb. 127, 59 N.W.2d 346 (1953); Silbert v. Silbert, 22 App. Div. 2d 893, 255 N.Y.S.2d 272 (1964); *In re* Sivak's Estate, 409 Pa. 261, 185 A.2d 778 (1962); Balfour's Estate v. Seitz, 392 Pa. 300, 140 A.2d 441 (1958).

The opposing view tends to treat the joint account as a distinct species of property ownership deserving special treatment. The phrase "poor man's will" echoes through the opinions.[95] Whether the holdings are explained in terms of effectuating the parties' intent under joint tenancy law,[96] on progressive contract law principles,[97] on a gift theory[98] or even on a trust rationale,[99] the result is usually the same—the survivor takes the funds. Language purporting to create a joint and survivor arrangement is given a strong presumptive effect; in many cases the presumption appears to be conclusive.[100] Decisions begin with the premise that the account arrangement is valid and then consider such questions as whether the survivorship right can be revoked by acts less persuasive than execution of a formal change in the account contract.[101]

It is in this area that some courts might move too quickly to recognize and enforce survivorship rights. Since adequate "convenience" arrangements are not generally available for accounts, a person suffering from or fearing some mental or physical disability is sometimes forced to utilize a joint account so that another person can make withdrawals on his behalf. A substantial risk exists that such a person will be offered the

95. *See, e.g.*, Pace v. First Nat'l Bank of Osawatomie, 277 F. Supp. 19 (D. Kan. 1965); O'Brien v. Biegger, 233 Iowa 1179, 1189-90, 11 N.W.2d 412, 417 (1943); Melton v. Ensley, 421 S.W.2d 44 (Mo. App. 1967); Pennsylvania Bank and Trust Co. v. Thompson, 432 Pa. 262, 247 A.2d 771 (1968). *See generally* Note, *Disposition of Bank Accounts: The Poor Man's Will*, 53 COLUM. L. REV. 103 (1953).

96. Prather v. Hill, 250 A.2d 690 (D.C. App. 1969); Presgrove v. Robbins, 451 P.2d 961 (Okla. 1969).

97. *See, e.g., In re* Estate of Stamets, 260 Iowa 93, 148 N.W.2d 468 (1967); Bowen v. Hathaway, 202 Kan. 107, 446 P.2d 723 (1968); Miles v. Hanten, — S.D. —, 164 N.W.2d 601 (1969).

98. Saylor v. Southern Ariz. Bank & Trust Co., 8 Ariz. App. 368, 446 P.2d 474 (1968); Urban v. Jackson, 434 P.2d 889 (Okla. 1967); Haywood v. Gill, 16 Utah 2d 299, 400 P.2d 16 (1965).

99. The theory which awarded the account balance to the survivor as beneficiary of an implied trust has now been discarded in all states. *See* Kepner, *Five More Years of the Joint Bank Account Muddle, supra* note 81, at 385. A strong argument, however, can be made for this discredited rationale. *See generally* Wellman, *The Joint and Survivor Account in Michigan—Progress Through Confusion*, 63 MICH. L. REV. 629, 661-64 (1965).

100. *See* Alaimo v. First Nat'l Bank of Thompsonville, 24 Conn. Supp. 369, 190 A.2d 924 (1963); Brennen v. Timmins, 104 N.H. 384, 187 A.2d 793 (1963); *In re* Paris' Estate, 32 Misc. 2d 1043, 223 N.Y.S.2d 569 (1961); *In re* Webb's Estate, 49 Wash. 2d 6, 297 P.2d 948 (1956).

101. *See* Pence v. Wessels, 320 Mich. 195, 30 N.W.2d 834 (1948); Mitts v. Williams, 319 Mich. 417, 29 N.W.2d 841 (1947). *See generally* Wellman, *supra* note 99, at 656-61.

standard joint account agreement, which includes a survivorship right. Such an arrangement is clearly inconsistent with the intent of the principal depositor. If the principal depositor dies first, extrinsic proof should be admissible to rebut the survivorship language in the deposit agreement. Among courts eager to enforce survivorship rights in accounts, there is a danger that such evidence will not be admitted or will not be found sufficiently persuasive in the face of contrary assertions by the survivor.[102]

Many courts, however, do recognize an exception based on a confidential relationship, and place on the survivor the burden of proving that the survivorship form was a result of the decedent's own free will.[103] If he cannot sustain the burden of proof, a constructive trust is enforced for the benefit of the decedent's estate.[104] This approach, however, creates the ironic result that the more distant the relationship of the survivor to the deceased co-owner, the more likely the survivorship will be upheld.

The difficulty the courts have had with joint accounts can be traced primarily to the insistence on forcing an essentially novel ownership arrangement into the mold of an existing set of legal principles. The joint account is fundamentally neither a common law joint tenancy, an ordinary inter vivos gift, a trust nor a will, yet it partakes of the features of all of these.[105]

The main fault of the contract theory in such instances is that it is premised on a fictitious analysis of intent. The typical donor co-owner who opens a survivorship account is not thinking about a contract with the donee concerning a survivorship right. What he does intend is a gift of a survivorship right, albeit a revocable and tenuous gift. The deposit contract with the financial institution is merely the means by which the gift intent is carried out. Slavish concentration by the courts on the written agreement of deposit diverts attention from this basic donative intent.

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102. *See, e.g.*, Kilfoy v. Fritz, 125 Cal. App. 2d 291, 270 P.2d 579 (1954); Maahs v. Maahs, 307 Mich. 549, 12 N.W.2d 335 (1943); Lau v. Lau, 304 Mich. 218, 7 N.W.2d 278 (1943); Meigs v. Thayer, 289 Mich. 680, 287 N.W. 342 (1939).

103. *See* McGahee v. Walden, 216 Ga. 352, 116 S.E.2d 559 (1960); Childs v. Shepard, 213 Ga. 381, 99 S.E.2d 129 (1957); *In re* Estate of Svab, 8 Ohio App. 2d 80, 220 N.E.2d 720 (1966).

104. *See* Swofford v. Swofford, 327 Ill. App. 55, 63 N.E.2d 615 (1945).

105. For an excellent discussion of the similarities and differences, see Kepner, *The Joint and Survivorship Bank Account, supra* note 81.

In addition to the fictitious analysis of intent, the contract theory can be faulted inasmuch as it carries with it application of rules from the entire body of contract law, including the rigid rules of contract interpretation.[106] For example, invocation of the parol evidence rule often excludes evidence of the parties' intent.[107] On the other hand, contract jurisdictions are not saddled with the incomplete gift problem. Some courts which evaluate joint accounts by conventional property law standards have held that the intended gift is defective because the donee did not receive a vested present interest in any portion of the account.[108] The results in cases where the donor co-owner changes his intent during his lifetime tend to support this analysis of the incompleteness of the gift.[109]

If it were essential to justify the joint account as constituting a completed gift, it could be argued that a present interest does pass on creation of the account. The interest involved is the right to receive the account on the occurrence of a future contingency—the donor co-owner's prior death at a time when the account had neither been closed nor its terms altered in such a way as to eliminate the donee co-owner's right. The concept of a present right in a contingent future interest is not unknown in property jurisprudence.[110] This attenuated gift analysis stretches the law only slightly more than the fictional contract analysis strains the facts.

A much more satisfactory resolution of the joint account problem would be frank recognition of the joint account as a valid and somewhat special ownership form, a result already reached in several states, including Minnesota.[111] If the courts

106. *See* Alaimo v. First Nat'l Bank of Thompsonville, 24 Conn. Supp. 369, 190 A.2d 924 (1963); *In re* Estate of Stamets, 260 Iowa 93, 148 N.W.2d 468 (1967); Shipman v. Hance, 109 Ohio App. 321, 165 N.E.2d 678 (1959); *In re* Amour's Estate, 397 Pa. 262, 154 A.2d 502 (1959); Barbour v. First Citizens Nat'l Bank of Watertown, 77 S.D. 106, 86 N.W.2d 526 (1957).

107. *See, e.g., In re* Estate of Stamets, 260 Iowa 93, 148 N.W.2d 468 (1967).

108. Crowell v. Milligan, 157 Neb. 127, 59 N.W.2d 346 (1953); *In re* Sivak's Estate, 409 Pa. 261, 185 A.2d 778 (1962); *In re* Fox's Estate, 16 Pa. D. & C.2d 425 (Pa. Orphans' Ct. 1959); Balfour's Estate v. Seitz, 392 Pa. 300, 140 A.2d 441 (1958).

109. *See* cases cited notes 116-18, *infra.*

110. *See* Blodgett v. Union & New Haven Trust Co., 111 Conn. 165, 149 A. 790 (1930); Farkas v. Williams, 5 Ill. 2d 417, 125 N.E.2d 600 (1955).

111. *See* Jacques v. Jacques, 352 Mich. 127, 89 N.W.2d 451 (1958). *See also* Dyste v. Farmers & Mechanics Sav. Bank of Minneapolis, 179

are not ready to sustain the joint account independent of conventional property or contract formulas, legislative sanction should be sought.

B. CONSEQUENCES

Although difficulties in the *creation* of joint and survivor co-ownerships are more frequent and attract more attention, the rights and duties arising between the co-owners as a *consequence* of having created a joint tenancy, and the implications of the relationship to interested third parties, also offer many puzzling problems. One set of questions concerns the interests in the jointly owned property while the co-owners are alive. A second group of problems arise when one of the co-owners dies and the effects of the survivorship right must be determined.

1. *Interests During the Life of the Co-owners*

(a) Possession and Control

Conventional joint tenancy doctrine teaches that each cotenant has an equal right to possess and derive benefits from the property.[112] As to tangible items of personal property, such as automobiles and livestock, this learning is still quite satisfactory.[113] As applied to the majority of co-ownerships in intangibles, however, the doctrine is clearly inappropriate. For example, a co-owner whose name appears on a joint and survivor account by the grace of another person ordinarily cannot compel a sharing in the account during the other's lifetime.[114] If he makes withdrawals contrary to the intention of the co-owner who furnished the consideration, he can be required to reimburse the account.[115] The disingenuousness of attempting to

Minn. 430, 229 N.W. 865 (1930); *In re* Lewis' Estate, 194 Miss. 480, 13 So. 2d 20 (1943); Slocum v. Bohuslov, 164 Neb. 156, 82 N.W.2d 39 (1957); *In re* Staver's Estate, 218 Wis. 119, 260 N.W. 655 (1935).

112. 2 AMERICAN LAW OF PROPERTY § 6.2 (A. Casner ed. 1952); Mamer, *Legal Consequences of Joint Ownership*, 1959 U. ILL. L.F. 944.

113. *See In re* Ebdon, 98 N.Y.S.2d 697 (Sur. Ct. 1950) (offspring of livestock held in joint tenancy are also jointly held).

114. *See* Kepner, *The Joint and Survivorship Bank Account, supra* note 81, at 615, 625, 632; Kepner, *Five More Years of the Joint Bank Account Muddle, supra* note 81; Nowicki v. Nowicki, 335 Mass. 392, 140 N.E.2d 175 (1957); Jacques v. Jacques, 352 Mich. 127, 89 N.W.2d 451 (1958). *Cf. In re* Estate of Gray, 27 Wis. 2d 204, 133 N.W.2d 816 (1965).

115. *See* Hagen v. Elmendorf, 365 Mich. 624, 113 N.W.2d 892 (1962); Allstaedt v. Ochs, 302 Mich. 232, 4 N.W.2d 530 (1942); Stanger v. Epler, 382 Pa. 411, 115 A.2d 197 (1955).

pass off joint and survivor accounts as effective inter vivos gifts is obvious, for the contributing co-owner can terminate the other's interest in the account by striking the other's name from the agreement,[116] by substituting another co-owner,[117] or by simply closing the account.[118] Similar rules are applied to government bonds.[119]

Corporate securities and contract rights held in survivor form present a somewhat different case, since these interests can more easily be the object of "completed gifts." Thus, it is generally held that unless the contributing co-owner can establish the absence of a gift, the donee co-owner can compel the surrender of a ratable portion of the assets[120] or a sharing in the benefits and control.[121]

From time to time the "right to control" issue is raised where one of the parties is the guardian of a co-owner. Where the guardian represents the donee co-owner, the results outlined above are not changed.[122] However, where the donor co-owner is incompetent, the guardian is usually not granted the same unlimited discretion to terminate the donee's interest by destroying the co-ownership. His power to remove property from the co-ownership arrangement is limited to the performance of his fiduciary duties to make adequate provision for the donor-ward.[123]

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116. Zander v. Holly, 1 Wis. 2d 300, 84 N.W.2d 87 (1957).

117. Medeiros v. Cotta, 134 Cal. App. 2d 452, 286 P.2d 546 (1955).

118. *In re* Estate of Ogier, 175 Neb. 883, 125 N.W.2d 68 (1963). The court stated in its syllabus of the case:

> 6. Where there is a joint tenancy created in a bank account and one joint tenant withdraws the whole or a part thereof, with or without the consent of the other joint tenant, and the character of the funds withdrawn is thus changed, there has been a severance of the joint tenancy as to the fund withdrawn and an extinguishment of the right of survivorship as to such funds.

Id. at 883, 125 N.W.2d at 70. *See also* Zander v. Holly, 1 Wis. 2d 300, 84 N.W.2d 87 (1957).

119. *See* Hill v. Havens, 242 Iowa 920, 48 N.W.2d 870 (1951); *In re* Chittock's Estate, 65 Ohio L. Abs. 432, 47 Ohio Op. 226, 106 N.E.2d 320 (P. Ct. 1952).

120. *See, e.g.*, Crook v. Crook, 185 Cal. App. 2d 745, 7 Cal. Rptr. 892 (1960).

121. *See, e.g.*, Lowry v. Magnolia Dev. Co., 273 Ala. 94, 134 So. 2d 760 (1961); Mamer, *supra* note 112, at 946-48.

122. Childs v. Shepard, 213 Ga. 381, 99 S.E.2d 129 (1957); Toomey v. Moore, 213 Ore. 422, 325 P.2d 805 (1958).

123. Howard v. Imes, 265 Ala. 298, 90 So. 2d 818 (1956); Boehmer v. Boehmer, 264 Wis. 15, 58 N.W.2d 411 (1953).

(b) Income, Profits and Expenses

The rules governing the allocation of gains and expenses of jointly held personalty closely parallel the law on possession and control. Where the contributing co-owner has complete control over the co-ownership property, he is not required to account to the other co-owner for any gains realized.[124] On the other hand, where the co-ownership has resulted in a completed gift to the donee co-owner, the donee is entitled to share in income or profits and may compel an accounting to secure this right.[125]

One troublesome problem that may arise in cases where one co-owner is seeking to recover the gains from the property is the determination of the extent of interest of the respective parties.[126] This issue is more commonly raised when a creditor seeks to assert a claim against the property; since the same standards should be utilized in each case, its discussion will await the consideration given to creditors' rights below.

A proportionate share of expenses incurred by one co-owner in the reasonable management and preservation of the jointly owned property may be claimed against the other co-owner.[127] Some jurisdictions do not recognize such a claim as giving rise to a personal action against the noncontributing co-tenant; instead, the expenses may only be set off against the other's profits; if no profits are realized, the claim may constitute a lien against the property.[128] In an arrangement where one co-owner's position is too tenuous to permit him to assert a present interest in either the property or the profits therefrom, it is unlikely that a claim for expenses would be allowed.

(c) Creditors

All states grant a creditor the power to garnish or levy execution on his debtor's interest in personal property held in joint tenancy.[129] It is a well-established principle, however, that

124. *See* Zander v. Holly, 1 Wis. 2d 300, 84 N.W.2d 87 (1957).
125. *Id.*
126. *See* Leaf v. McGowan, 13 Ill. App. 2d 58, 141 N.E.2d 67 (1957). *Cf.* Jezo v. Jezo, 23 Wis. 2d 399, 127 N.W.2d 246 (1964); Wellman, *supra* note 99, at 641-42.
127. *Cf.* Allen v. Allen, 363 S.W.2d 312, 316 (Tex. Civ. App. Ct. 1962).
128. *See* Mamer, *supra* note 112, at 948.
129. *See* Murphy, *Cotenancies: A Critique for Creditors*, 48 VA. L. REV. 405, 408 (1962). However, most state laws generally provide for significant exemptions of personal property from execution. *See, e.g.*, IOWA CODE ANN. §§ 627.6-627.7 (1950); MINN. STAT. § 550.37 (1967);

a creditor's rights to apply property to the satisfaction of his claim can rise no higher than the debtor's own interest in the property.[130] If the creditor has a claim against fewer than all of the co-owners, a determination of the parties' respective ownership interests is required. The question is whether the interest of the debtor is to be determined by his apparent proportionate ownership of the property, by his contributions to the co-ownership, or by some other criterion, such as whether a completed gift has occurred.[131] Different rules and presumptions are applied by the several states. A few courts hold that the creditor is entitled to reach the entire account, except to the extent that nondebtor co-owners can establish a contribution on their part.[132] Other courts require the creditor to prove his debtor's contributions.[133] In most states, however, there is a presumption that the debtor owns a proportionate share of the account; either the creditor or the other co-owners can offer proof to rebut the presumption.[134]

It seems unfair to permit a debtor to place assets beyond the reach of a creditor merely by selecting a particular form of ownership. For this reason, any approach should tie the debtor's interest to his contributions; in addition, creditors' reliance on the apparent proportionate ownership should be protected by creating a presumption of equal ownership in the absence of satisfactory proof of contributions. Several legislatures have adopted this approach.[135]

WASH. REV. CODE ANN. § 616.020 (Supp. 1967). These statutes exempt such important items as automobiles, household furniture and a limited amount of livestock.

130. *See* Murphy, *supra* note 129, at 408; Treadwell & Shulkin, *Joint Tenancy—Creditor-Debtor Relations*, 37 WASH. L. REV. 58, 64 (1962). Tenancy by the entirety ownership is subject to different rules respecting creditors in some jurisdictions, so care should be used in segregating joint tenancy cases. *See* Huber, *Creditor's Rights in Tenancies by the Entireties*, 1 B.C. IND. & COM. L. REV. 197 (1960).

131. *See generally* Murphy, *supra* note 129; Wellman, *supra* note 99, at 641, 654; Mamer, *supra* note 112, at 960; Note, *The Right of the Individual Creditor Against the Joint and Survivorship Bank Account*, 42 IOWA L. REV. 551, 553-55 (1957).

132. *See, e.g.*, Park Enterprises v. Trach, 233 Minn. 467, 47 N.W.2d 194 (1951) (even though the joint account consisted of contributions from both husband and wife co-owners).

133. *See, e.g.*, Esposito v. Palovick, 29 N.J. Super. 3, 101 A.2d 568 (1953).

134. *See, e.g.*, Sussex v. Snyder, 307 Mich. 30, 11 N.W.2d 314 (1943); Murphy v. Michigan Trust Co., 221 Mich. 243, 190 N.W. 698 (1922); Dover Trust Co. v. Brooks, 111 N.J. Eq. 40, 160 A. 890 (1932).

135. NEB. REV. STAT. § 30-624 (1965); N.C. GEN. STAT. § 41-2.1 (1966); S.D. LAWS ch. 198 (1969).

The bankruptcy of a co-owner affects the ability of creditors to reach jointly owned assets somewhat differently. The trustee in bankruptcy is empowered to apply to the bankrupt's debts all property which the bankrupt could have transferred by any means.[136] Therefore, an issue important to both the trustee and the other co-owners is whether the bankrupt had any interest in the property which he could have asserted through withdrawals or sale.[137] Where the bankrupt has made no contribution to the co-ownership, the other co-owner should be permitted to prove that no completed gift of a present right in the property took place.

(d) Taxation

(1) Gift Tax

The creation of a joint tenancy gives rise to a possible gift tax whenever the co-ownership arrangement results in a completed gift.[138] Thus, gratuitous creation of co-ownership in tangible items of personalty and in intangibles respresented by title documents is normally a taxable event since the donee is granted an immediate fractional interest in the property.[139] Contrary to common understanding, this is true regardless of the relationship of the co-owners. Where the subject of the gift is personal property, only the extent of the gift that is taxable is affected by the joint tenant's marital relationship.[140]

Where the nature of the co-ownership is one in which the donee co-owner is granted no immediate right to claim any of the property, the creation of the co-ownership is not a taxable event.[141] If the donee is permitted to and does claim ownership

136. Bankruptcy Act, 11 U.S.C. § 110(a)(5) (1964).

137. *See* Simon v. Schaetzel, 189 F.2d 597 (10th Cir. 1951).

> [T]here is an underlying concept that, for any property or right not listed in the special clauses to pass to the bankruptcy trustee, it must have the characteristic of being transferable or leviable. This depends upon local law, and the law applicable has usually been considered to be that of the state in which the property or property right is located.

3 H. REMINGTON, BANKRUPTCY LAW § 1178 (6th ed. 1957).

138. INT. REV. CODE of 1954, § 2511(a); Treas. Reg. §§ 25:2511-1 (h)(4) & (5) (1958).

139. Treas. Reg. §§ 25.2511-1(a), (c), (h)(5) (1958). *Cf.* Treas. Reg. §§ 25.2503-4(c) (1958); *See also* Commissioner v. Hart, 106 F.2d 269 (3d Cir. 1939).

140. INT. REV. CODE of 1954, § 2523; Treas. Reg. §§ 25.2523(a)-1(a), (b)(ii) (1958).

141. Treas. Reg. §§ 25.2511-2(b) & (c) (1958); Burnet v. Guggenheim, 288 U.S. 280 (1933). *See also* Kahn, *Joint Tenancies and Tenancies*

of any part of the co-ownership property during the lifetime of the donor, a tax may be levied on the extent of the property converted to the donee's use.[142] Thus, the gratuitous creation of the typical joint account or co-ownership in government bonds[143] does not result in an immediate gift tax liability because the gift is regarded as incomplete. The gift tax is, however, imposed whenever the donee acquires a serverable and irrevocable interest in the property, such as he would by withdrawing funds from the joint account or by cashing the bond.

A number of jurisdictions impose a state gift tax on gratuitous transfers. Under most of these laws, the handling of gifts involving joint tenancies closely parallels the federal provisions.[144]

(2) Income Tax

Under both state[145] and federal law[146] the income from jointly owned property is taxed to the co-owners in equal shares whenever the co-ownership arrangement has created fixed fractional interests in the property, even though the parties may

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by the Entirety in Michigan—Federal Gift Tax Considerations, 66 MICH. L. REV. 431, 433 (1968); Young, *Tax Incidents of Joint Ownership*, 1959 U. ILL. L.F. 972, 978; Worthy, *Problems of Jointly Owned Property*, 22 TAX LAW. 601, 614 (1969).

142. Treas. Reg. § 2511-1(h)(4) (1958); *See also* C. LOWNDES & R. KRAMER, FEDERAL ESTATE AND GIFT TAXES 666 (2d ed. 1962):

> Of course, even the withdrawal of more than he has deposited in a joint bank account will not be a taxable gift to the person making the withdrawal from the other depositor unless a direct payment of the amount of the withdrawal would have been a gift. Thus, for example, if H deposits money in a joint account for himself and his wife, W, and W withdraws amounts from the account to pay for household expenses, the withdrawal will not constitute a gift from H to W, because a direct advance from H to W to pay household expenses would not be a taxable gift.

143. Treas Reg. § 25.2511-1(h)(4) (1958).

144. *See, e.g.*, CAL. REV. & TAX CODE §§ 15104, 15104.5 (West Supp. 1968); *Calif. Regs. Relating to the Gift Tax Law § 15104(e)*, CCH INH. EST. & GIFT TAX REP. ¶ 2716; COLO. REV. STAT. ANN. § 138-4-6 (1963); MINN. STAT. § 292.01(3) (1967); OKLA. STAT. tit. 68, § 1041(b) (1961); Effland, *Estate Planning: Co-Ownership*, 1958 WIS. L. REV. 507, 535.

145. *See, e.g.*, IOWA CODE ANN. § 422.7 (Supp. 1969); Effland, *supra* note 144, at 536.

146. INT. REV. CODE of 1954, § 61a. If local law allows the joint tenancy arrangement with respect to ownership of property and thereby recognizes as one of the incidents of that arrangement that each co-owner has a right to share in the property and the income therefrom, then a proportionate amount of the income will be charged to each owner. *See* Frederick J. Haynes, 7 B.T.A. 465 (1927).

have made disproportionate contributions[147] and even though one co-owner receives all of the income.[148]

The federal income tax provisions, like the gift tax provisions, impose a tax only on the donor co-owner if the co-ownership arrangement does not result in a completed gift. Thus, the donor of a joint account or a government savings bond who maintains complete control over the property is fully taxed on the interest income.[149] In the case of a government bond where the owner is permitted to defer recognition of interest income until the bond is surrendered,[150] an assignment of income issue is raised where the gift is subsequently completed by allowing the donee co-owner to cash the bond and retain the proceeds. Under the *Horst*[151] doctrine, the donor is required to report income in the amount of the increment in value of the bond in the year it is surrendered.[152]

Expense deductions arising from income producing joint tenancies are apparently totally deductible by the co-owner actually making the payment.[153] This anomalous "payment rule" has thus far been applied only to payments of property taxes and mortgage interest in husband and wife joint tenancies.[154] Commentators suggest that because the rule is inconsistent with local

147. James R. Baer, 11 CCH Tax Ct. Mem. 520 (1952); Frederick J. Haynes, 7 B.T.A. 465 (1927); Rev. Rul. 23-12441, 1946-2 CUM. BULL. 51. The equal sharing policy makes joint tenancy a possible technique for achieving some income shifting where the co-owners are other than husband and wife. *See* Young, *supra* note 141, at 989-91.

148. *See* Morgan v. Finnegan, 182 F.2d 649 (8th Cir. 1950).

149. Rev. Rul. 143, 1954-1 CUM. BULL. 12.

150. INT. REV. CODE of 1954, § 454(c).

151. Helvering v. Horst, 311 U.S. 112 (1940).

152. *See* Rev. Rul. 55-278, 1955-1 CUM. BULL. 471.

> Series E United States savings bonds registered in the names of *A* and *B* in the alternative as coowners, which *A* had purchased in 1948 entirely with his own funds, were reissued in 1953 in the name of *B* alone in order to effect a gift to him of *A*'s coownership therein. *Held*, . . . (2) the interest (increment in value) that had accrued (as earned) on the bonds before their reissue is all includible in *A*'s gross income, for Federal income tax purposes, for his taxable year or period wherein he made such gift, except such interest as he has properly returned as income previously.

See also Treas. Reg. § 1.163-1(b), T.D. 6593, 1962-1 CUM. BULL. 23; Treas. Reg. § 1.164-1(a), T.D. 6780, 1965-1 CUM. BULL. 98.

153. F.C. Nicodemus, Jr., 26 B.T.A. 125 (1932).

154. *See* Oren C. White, 18 T.C. 385 (1952) where the Tax Court refused to extend the "payment rule" to general operating expenses of a farm held in tenancy by the entirety. Although *H* paid all the expenses he was only allowed to deduct one-half of the operating loss; *W* was entitled to the other one-half.

property law and with the approach taken in taxing income from joint tenancy property, it is unlikely to be extended beyond the husband and wife co-ownership. It should be noted that in the husband and wife situation, the joint filing option renders this rule relatively harmless.[155]

2. *After Death: The Effects of Survivorship*

(a) Special Claimants

The earlier treatment of creation problems dealt extensively with the enforceability of the survivorship right against takers in the estate of the decedent co-owner. One principle noted was that if the survivorship arrangement is valid, the survivor's claim to the property takes precedence over the decedent's heirs and ordinary will beneficiaries. It is also well settled that a co-owner cannot destroy the survivorship right by will.[156] Not so clear, however, is the vulnerability of the survivor's right to claims made by those with special standing to challenge the survivorship. Special claimants include the decedent's surviving spouse, the beneficiary under a contractual will, and state or federal governments. In addition, the estate representative who seeks to apply the joint tenancy property to estate debts and charges might also be considered a special claimant; this matter, however, will be covered in the discussion of the rights of creditors.

(b) Surviving Spouse

In nearly every state a surviving spouse has special status to challenge the decedent's disposition at death.[157] Nevertheless,

155. *See* Young, *supra* note 141, at 938.

156. Reichelderfer, *Severance of Joint Tenancies*, 1959 U. ILL. L.F. 932, 933-34; Swenson & Degnan, *Severance of Joint Tenancies*, 38 MINN. L. REV. 466, 469 (1954).

157. A power to elect against the spouse's will is the most common. *See* 2 P-H ESTATE PLANNING, WILLS, TRUSTS ¶ 2735; Hines, *Freedom of Testation and the Iowa Probate Code*, 49 IOWA L. REV. 724 (1964). Some states permit a separate challenge of testamentary gifts to charity. *See* 1 P-H ESTATE PLANNING, WILLS, TRUSTS ¶ 1020; Rees, *American Wills Statutes*, 46 VA. L. REV. 856, 867 (1960). Many states grant the surviving spouse the right to continued possession of the family homestead. *See* 2 P-H ESTATE PLANNING, WILLS, TRUSTS ¶ 2734. Many states also provide for an allowance from the estate to the surviving spouse. *See* T. ATKINSON, WILLS 128-29 (2d ed. 1953); 2 P-H ESTATE PLANNING, WILLS, TRUSTS ¶ 2734. An inter vivos transfer intended to defeat spousal rights may be set aside on grounds of fraud. *See* Davis v. Davis, 98 So. 2d 777 (Fla. 1957); Dorrough v. Grove, 257 Ala. 609, 60 So. 2d 342 (1952). In

survivorship arrangements are generally held effective to defeat spousal rights.[158] The decisions are usually premised on an inter vivos gift analysis. The rule even extends to joint bank account situations where the absence of a completed gift is recognized in disputes over the co-owner's rights inter vivos.[159] This result in joint tenancy cases is, however, consistent with the treatment afforded other probate avoidance techniques such as revocable and Totten trusts.[160]

The current posture of the law thus appears to present a classic illustration of form triumphing over substance. Refusing to allow spousal claims to pierce such will substitutes permits a married property owner to enjoy the benefits of his property up to his death and yet deprive his spouse of an interest in property after his death. In states following a nonapportionment rule for payment of estate taxes,[161] employment of probate avoidance techniques may further reduce the share of the surviving spouse by increasing the taxes which must be paid by the estate. The majority position is at odds with the generally protective policy of the law toward the surviving spouse; indeed some commentators observe a trend in recent decisions toward sub-

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many jurisdictions all real estate transfers require the consent of the transferor's spouse to avoid the possible assertion of special spousal rights. *See* 2 P-H ESTATE PLANNING, WILLS, TRUSTS ¶ 2731.

158. *See, e.g.*, Laterza v. Murray, 2 Ill. 2d 219, 117 N.E.2d 779 (1954); Turner v. Turner, 185 Va. 505, 39 S.E.2d 299 (1946).

159. *See, e.g.*, Whittington v. Whittington, 205 Md. 1, 106 A.2d 72, 75 (1954), *quoting* Ragan v. Kelly, 180 Md. 324, 330-31, 24 A.2d 289, 293 (1942): "In any particular case the question whether a trust in law has been created effectually to vest the fund in the survivor depends entirely upon the actual intention of the original owner of the fund at the time he had the entry in the bankbook made."

See also In re Prokaskey's Will, 109 N.Y.S.2d 888 (Sur. Ct. 1951) at 891, *citing In re* Totten, 179 N.Y. 112, 125, 71 N.E. 748, 752 (1904): "It is a tentative trust merely, revocable at will, until the depositor dies or completes the gift in his lifetime by some unequivocal act or declaration, such as delivery of the passbook or notice to the beneficiary."

160. *See* DeLeuil's Executors v. DeLeuil, 255 Ky. 406, 74 S.W.2d 474 (1934); Beirne v. Continental-Equitable Title & Trust Co., 307 Pa. 570, 161 A. 721 (1932). To the contrary are cases involving revocable inter vivos trusts which hold that the surviving spouse of the settlor can reach or take into account the trust property for purposes of satisfying marital rights. *See* Smith v. Northern Trust Co., 322 Ill. App. 168, 54 N.E.2d 75 (1944); Kerwin v. Donaghy, 317 Mass. 559, 59 N.E.2d 299 (1945); MacGregor v. Fox, 280 App. Div. 435, 114 N.Y.S.2d 286 (1952), *aff'd*, 305 N.Y. 576, 111 N.E.2d 445 (1953). *See also* cases collected in 1 A. CASNER, ESTATE PLANNING 114 n.18 (3d ed. 1961).

161. *See, e.g.*, IOWA CODE ANN. § 633.449 (Supp. 1969). *See also* CCH INH. EST. & GIFT TAX REP. ¶ 2030.

jecting probate avoidance schemes to spousal claims.[162]

In Pennsylvania and New York, the legislatures have intervened to ameliorate the plight of the surviving spouse.[163] In both states a surviving spouse is allowed to treat as a testamentary disposition transfers in which the deceased retained a power to revoke. Only the New York statute, however, specifically covers joint tenancies. The Uniform Probate Code may lend further impetus to reform movements through its use of an "augmented estate" concept in relation to the rights of a surviving spouse.[164]

If the surviving spouse is to be permitted to reach property transferred through will substitutes, joint tenancy property should be included. A tactical question arises, however, concerning how this should be accomplished. Should joint tenancy law include provisions subjecting jointly owned assets to the rights of a surviving spouse or should the spousal rights issue be dealt with in a separate statute designed to reach all probate avoidance techniques?[165] Although there is some force in the argument that change must start somewhere and might just as well be introduced in the course of joint tenancy reform, it seems that such a shift should be comprehensively made, and not done piecemeal among the various will substitute techniques. A piecemeal approach could produce an undesirable situation in which the devious property owner could defeat his spouse's interest simply by keeping one jump ahead of reform efforts.

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162. *See* 1 A. SCOTT, TRUSTS § 58.5 (3d ed. 1967). *See also* RESTATEMENT (SECOND) OF TRUSTS § 58, comment (e) (1959). The inherent conflict between policies of free alienation of property and protection of the surviving spouse have fascinated a number of legal scholars and have made the subjection of probate avoidance schemes to defeat spousal rights a controversial issue. *See, e.g.*, Plager, *The Spouse's Nonbarrable Share: A Solution in Search of a Problem*, 33 U. CHI. L. REV. 681 (1966); Scoles, *Conflict of Laws and Nonbarrable Interests in Administration of Decendent's Estates*, 8 U. FLA. L. REV. 151 (1955).

163. PA. STAT. ANN. tit. 20, § 301.11 (Purdon Supp. 1969); N.Y. ESTATE, POWERS & TRUSTS LAW § 5-1.1 (McKinney 1967).

164. UNIFORM PROBATE CODE § 2-202 (Working Draft No. 5, 1968). Under the provisions of the Uniform Code, a surviving spouse has a right to elect a one-third interest in the agumented estate, which includes (1) lifetime transfers by the decedent in which the decedent retained a life interest in the property transferred or a general power of appointment and to which the survivor did not consent; (2) transfers creating joint tenancies and (3) gifts of more than $3,000 per year for the two years prior to death.

165. *See generally* Wellman, *The Joint and Survivor Account in Michigan—Progress Through Confusion*, 63 MICH. L. REV. 629, 664 (1965).

(c) Contractual Will

One situation requiring a determination of the effect of joint tenancy on the operation of a contractual will is where the parties to the joint will are co-owners of some of their property with right of survivorship. Does the contractual will restrict the survivor's power to freely transfer the joint tenancy property? Classic joint tenancy theory suggests it does not.[166] This issue is often of primary importance in reckoning the taxability of the transfers.[167]

A second situation in which joint tenancy ownership raises a possible conflict with a contractual will is where the deceased co-owner was the surviving party to an earlier contractual will which bound him in the testamentary disposition of his estate. The question here is whether the interest taken by the surviving co-owner is derived through a testamentary transfer in breach of the requirements of the contractual will.

Most of the cases concern joint and survivor accounts. Consistent with the general policy toward such accounts, it is regularly held that the surviving co-owner receives his interest through an inter vivos gift and not through a testamentary transfer.[168] Again it requires some ingenuity for the courts to square their gift rationale in these cases with the contrary results in inter vivos disputes between co-owners. Typically, the transfer by gift is characterized as having been incomplete during the donor's life but vesting in complete ownership at his death.[169]

(d) Government Claims

Government liens are often made applicable to all of the debtors' property. Co-ownership property can be subjected to a lien growing out of a claim against one of the co-owners,[170] but these liens usually must be filed to be enforceable against

166. *See generally* Effland, *supra* note 144; Note, *Joint Tenancies and Wills*, 1959 U. ILL. L.F. 1043.

167. *See* United States v. Ford, 377 F.2d 93 (8th Cir. 1967); Awtry v. Commissioner, 221 F.2d 749 (8th Cir. 1955).

168. *See* McLean v. United States, 224 F. Supp. 726 (E.D. Mich. 1963). *Cf. In re* Quinn, 23 App. Div. 2d 548, 256 N.Y.S.2d 309 (1965); Little v. Cunningham, 381 P.2d 144 (Okla. 1963).

169. *See In re* Prokaskey's Will, 109 N.Y.S.2d 888, 891 (Sur. Ct. 1951).

170. *See generally* Swenson & Degnan, *supra* note 151, at 493; King, *Federal Tax Liens and Jointly Owned Property*, 46 TAXES 7, 8 (1968).

bona fide purchasers of the property.[171] However, even without a special filing, such statutory liens may be enforceable against a gratuitous transferee.[172] The question then is whether the interest of the surviving joint tenant can be subjected to general statutory liens based on governmental claims against the deceased co-owner.

One type of lien which has been asserted against the survivor arises under the provisions of state old-age and assistance laws. Such laws often grant the state a claim which can be asserted against all property owned by the individual receiving assistance.[173] Two issues are raised by the state's attempt to assert the lien against property in the hands of a surviving joint tenant. First, is the joint tenancy relationship severed by the imposition of the lien? It is generally held that the survivorship right is not affected.[174] Second, assuming no severance, is the lien enforceable against the joint tenancy property in the hands of the survivor? Except for an analogy to an unfortunate doctrine in the law of real estate joint tenancies,[175] no good argument can be offered for freeing the property from a valid lien.[176] Liens arising as the result of the decedent co-owner's failure to pay his taxes are the major threat to the tranquility of the survivor's ownership. Both federal[177] and state[178] tax laws create liens against the property of a delinquent taxpayer. It has never been seri-

171. *See* INT. REV. CODE of 1954, § 6323(a).

172. *See* Treas. Reg. §§ 301.6323-1(a) & 2(a): "The term 'purchaser' means a person who, for a valuable consideration, acquires property or an interest in property."

173. *See* IOWA CODE ANN. §§ 249.19 & 249.20 (1969); MINN. STAT. § 256.26(6) (1967).

174. WIS. STAT. ANN. § 49.26(5) (1957); Weaver v. New Bedford, 335 Mass. 644, 140 N.E.2d 309 (1957); Gau v. Hyland, 230 Minn. 235, 41 N.W.2d 444 (1950). *But see* ILL. ANN. STAT. § 3-10.8 (Smith-Hurd 1968) which provides for severance of the joint tenancy when the lien is properly recorded. In Wisconsin, the court decided that a severance occurred. *In re* Feiereisen's Estate, 263 Wis. 53, 56 N.W.2d 513 (1953). A special statute was then enacted to restore the integrity of titles taken through survivorship rights. WIS. STAT. ANN. § 49.26(5) (1957).

175. *See* text accompanying notes 180-82 *infra*.

176. The meager authority which exists, however, follows the common law doctrine that a mere charge or burden on the interest of a joint tenant does not effect a severance and holds that the lien dies with the expiration of the deceased's interest. *See* note 174 *supra*.

177. INT. REV. CODE of 1954, § 6321. The lien is on "all property and rights to property, whether real or personal, belonging to such person." *See generally* W. PLUMB & L. WRIGHT, FEDERAL TAX LIENS 33 (Taxation Practice Handbook No. 4, ALI 1967).

178. *See, e.g.*, ILL. STAT. ANN. § 698 (Smith-Hurd 1954); IOWA CODE ANN. § 422.26 (1949); NEB. REV. STAT. §§ 77-203, 77-205 (1958).

ously argued that such liens automatically sever the joint tenancy, but attempts have been made to assert them against property passing under a survivorship arrangement. In the few cases reported, the federal government has been unsuccessful in reaching the property in the hands of the survivor.[179] While the results have been justified in terms of the technicalities of the statute under which the lien was created, it is difficult to justify permitting the survivorship right to insulate the property from the enforcement of claims for decedent's unpaid taxes.

(e) Creditors

The general rule regarding the secured creditor who has not initiated enforcement of his lien prior to death seems to be that his lien dies with the debtor.[180] The technical basis for this result is found in the ancient tenet that each joint tenant's interest is *"per tout."*[181] Reliance on this concept is usually justified as consistent with the general policy of holding creditors to a high standard of diligence.[182] This rationale partially supports denying the claim of the chattel mortgagee who neglected to obtain binding obligations from all co-owners, but it certainly does not justify denying relief for the creditor whose lien arises by statute. As noted in the prior section, it is difficult to perceive the social policy underlying a rule that denies the enforcement of a lien simply because the decedent to whose property the lien attached happened to be a joint tenant.

The unsecured creditor of a joint tenant who relies on co-ownership assets to satisfy his claim is also well advised to pray for the debtor's continued good health. Through application of

179. In cases involving transferee liability where no lien had arisen before death, it has been held that the decedent's interest is extinguished rather than "transferred" to the survivor. Tooley v. Commissioner, 121 F.2d 350 (9th Cir. 1941); Irvine v. Helvering, 99 F.2d 265 (8th Cir. 1938); Fercurotta v. United States, 154 F. Supp. 592 (D.C. Ariz. 1956).

180. *See* Swenson & Degnan, *supra* note 156, at 493; Treadwell & Shulkin, *supra* note 130, at 59-63.

181. The Iowa Supreme Court, for example, has explained this concept as follows: "In a legal sense, his death does not transfer the rights that he possessed in the property to the surviving tenant. Death does not enlarge the estate. Death terminates his interest in the estate. It is rather a falling away of the tenant from the estate than the passing of the estate to others." Fleming v. Fleming, 194 Iowa 71, 88, 89, 174 N.W. 946, 953 (1919).

182. *See, e.g.*, People v. Nogarr, 164 Cal. App. 2d 591, 330 P.2d 858 (1958); Ziegler v. Bonnell, 52 Cal. App. 2d 217, 126 P.2d 118 (1942). *Cf.* Peoples Trust & Sav. Bank v. Haas, 328 Ill. 468, 160 N.E. 85 (1927); Musa v. Segelke & Kohlhaus Co., 224 Wis. 432, 272 N.W. 657 (1937).

the joint tenancy notion of ownership by the whole[183] or through adoption of a completed gift analysis,[184] courts have consistently denied creditors the right to garnish or levy execution on joint tenancy property in the hands of the survivor, except in situations where the original creation of the joint tenancy constituted a transfer in fraud of creditors.[185]

The creditor's uncomfortable situation is further aggravated by the procedural lengths to which he must go to sever the joint tenancy. It is well settled that attachment of the property does not cause severance.[186] Similarly, the institution of suit, the obtaining of a personal judgment,[187] garnishment or a levy of execution do not result in a severance.[188] In most states the effective event is the execution sale of the joint owner's interest.[189]

Several states have enacted legislation designed to relieve the creditor's plight. Some statutes do no more than specify the point in the collection process at which a severance occurs.[190]

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183. Wood v. Logue, 167 Iowa 436, 149 N.W. 613 (1914); *see* cases cited note 182 *supra.*

184. Hughes v. Fairfield Lumber & Supply Co., 143 Conn. 427, 123 A.2d 195 (1956); DeForge v. Patrick, 162 Neb. 568, 76 N.W.2d 733 (1956). *But see In re* Granwell, 20 N.Y.2d 91, 228 N.E.2d 779, 281 N.Y.S.2d 783 (1967).

185. Courts generally refuse to accept the argument that where the joint tenant is insolvent at death the survivor's interest arises as the result of a transfer in fraud of creditors. The common law notion of each owner's interest being in the whole of the property is the common ground for rejecting this fraudulent conveyance analysis. *See* DeForge v. Patrick, 162 Neb. 568, 76 N.W.2d 733 (1956) (conveyance into joint tenancy not fraudulent when debts were incurred four years later). *Contra, In re* Granwell, 20 N.Y.2d 91, 228 N.E.2d 779, 281 N.Y.S. 2d 783 (1967) (survivor's interest in a mutual fund account was taken in fraud of creditors where the other joint tenant died insolvent).

186. New Haven Trolley & Bus Employees Credit Union v. Hill, 145 Conn. 332, 142 A.2d 730, 733 (1958). *See* Wilson v. Kelso, 250 Iowa 67, 92 N.W.2d 392 (1958); First Nat'l Bank of Linn Grove v. Kindwall, 201 Iowa 82, 206 N.W. 241 (1925).

187. Peoples Trust & Sav. Bank v. Haas, 328 Ill. 468, 160 N.E. 85 (1927); Musa v. Segelke & Kohlhaus Co., 224 Wis. 432, 272 N.W. 657 (1937).

188. Van Antwerp v. Horan, 390 Ill. 449, 61 N.E.2d 358 (1945). *Contra,* Sussex v. Snyder, 307 Mich. 30, 11 N.W.2d 314 (1943); Dover Trust Co. v. Brooks, 111 N.J. Eq. 40, 160 A. 890 (1932).

189. New Haven Trolley & Bus Employees Credit Union v. Hill, 145 Conn. 332, 142 A.2d 730 (1958); Gau v. Hyland, 230 Minn. 235, 41 N.W.2d 444 (1950); *see also* Annot. 161 A.L.R. 1139, 1140 n.1 (1946); 2 AMERICAN LAW OF PROPERTY § 6.2, at 10 (A. Casner ed. 1952).

190. KAN. GEN. STAT. ANN. § 58-501 (Supp. 1961); MASS. GEN. LAWS ANN. ch. 236, § 12 (1959); OKLA. STAT. tit. 60, § 74 (1961).

Others comprehensively revise and codify creditors' rights in jointly owned property.[191] It is clear, however, that corrective legislation is needed in states where the courts are bound up in the thicket of common-law survivorship doctrine.

(f) Taxation[192]

The federal estate tax law provides that all property owned by a decedent as a joint tenant must be included in his gross estate except to the extent it can be proved by the estate representative that the survivor contributed to the co-ownership.[193] The effect of the statutory language is to create a presumption of total contribution by the decedent.[194] The burden of proving the survivor's contributions is frequently a difficult task because the Treasury has restrictively interpreted the question of what constitutes an independent contribution[195] and because there are practical evidentiary problems, such as the absence or incompleteness of financial records.

Since most joint tenancies are between husband and wife, the automatic qualification of joint tenancy transfers under the marital deduction[196] means that the major estate tax difficulties with joint tenancy arise on the death of the survivor. Excessive use of joint tenancy frequently results in over-qualification for the marital deduction which in turn leads to unnecessarily heavy taxation on the transmission of the family wealth to the next generation by the survivor, either by gift or at death.[197] This danger constitutes the estate planner's primary quarrel with

191. CONN. GEN. STAT. ANN. §§ 47-14(e), 47-14(f) (1959); NEB. REV. STAT. § 30.624 (1964); N.C. GEN. STAT. ANN. § 41-2 (1963); OKLA. STAT. tit. 60, § 74 (1961); S.D. COMP. LAWS § 30-21A-1 (Supp. 1969); VA. CODE ANN. § 55-20 (1959); WIS. STAT. ANN. § 230.455 (Supp. 1969).

192. Because the subject of taxation on the death of a joint tenant has been extensively treated in other writings, only the general outline of the tax laws will be presented here. For more detailed expositions, *see* Dean, *Federal Tax Consequences of Joint Ownership*, 53 GEO. L.J. 863 (1965); Hines, *Real Property Joint Tenancies: Law, Fact and Fancy*, 51 IOWA L. REV. 582 (1966); Riecker, *Joint Tenancy: The Estate Lawyer's Continuing Burden*, 64 MICH. L. REV. 801 (1966); Effland, *supra* note 144, at 529.

193. INT. REV. CODE of 1954, § 2040.

194. Treas. Reg. § 20.2040-1(a)(2).

195. *See* Treas. Reg. § 20.2040-3(f).

196. INT. REV. CODE of 1954, § 2056(e)(5); Treas. Reg. § 20.2056(e)(1)(a)(1).

197. *See* the explanation of the tax implications in Hines, *supra* note 192, at 599-601.

joint tenancy.[198]

At the state level, death taxation varies, though many states closely follow the federal pattern.[199] Thus, the threat of extra taxation is repeated, although generally at a lower tax rate. Other states treat joint tenancies the same as tenancies in common,[200] thereby allowing the survivor to avoid both the difficulties of proving contribution and the danger of higher taxes. A few states exclude joint tenancies from the coverage of their death tax system.[201] In these states joint tenancy offers the advantage of avoiding local tax on the death of the first co-owner.

It should be noted that both the federal estate tax and most state death taxes contain provisions casting liability both on the joint tenancy property and on the survivor. On the date of the joint tenant's death a statutory lien attaches to all property subject to death taxation.[202] Of more critical importance, the federal estate tax law[203] and most state death tax statutes[204] impose personal liability for payment of death taxes on persons taking property under a survivorship right. Thus, if the deceased co-owner's probate estate is insolvent, the surviving joint tenant is personally liable for death taxes attributable to the property and the property is subject to a lien for the unpaid taxes.

3. *Reasons versus Consequences*

To the extent a conscious choice is made, property owners presumably select an ownership form because they intend to incur the consequences associated with that form. Therefore, it would seem a plausible hypothesis that one's reasons for selecting a particular ownership form are directly related to one's un-

198. *See* 1 A. CASNER, *supra* note 160, at 783; Riecker, *supra* note 192; Stacey, *Joint Tenancy and Estate Planning*, 37 WASH. L. REV. 44 (1962).

199. *See* CCH INH. EST. & GIFT TAX REP. ¶ 1570.

200. *See* CCH INH. EST. & GIFT TAX REP. ¶ 1570; (Colo., Conn., Del., D.C., Ill., Ky., Me., Mont., Pa., [except husband and wife], S.D., Wis.).

201. *See* CCH INH. EST. & GIFT TAX REP. ¶ 1570; (Alas., La., Md., Mich., Mo., Pa., [as to husband and wife joint tenancies, except those created in contemplation of death], Vt. [husband and wife only], Wash. [as to real property held in tenancy by the entirety], Wyo.).

202. INT. REV. CODE of 1954, § 6324(a)(1).

203. INT. REV. CODE of 1954, § 6324(a)(1).

204. For the state provisions see CCH INH. EST. & GIFT TAX REP. ¶ 2030.

derstanding of the consequences of holding property in the manner chosen.

To test this hypothesis, respondents in the field study were asked why they selected specific ownership forms. The overwhelming majority could recall no specific reason. To yield more usable data, the matter could have been pressed somewhat and the respondent offered a list of possible reasons to stimulate his recall. In the pilot stage the interviewers did use this technique, but they reported that the interview was so extended that its completion was jeopardized. For this reason, it was decided not to pursue the reasons beyond asking the open-ended question. The reasons reported and the frequency with which they were offered are shown in Appendix XVIII. This table shows that the three major factors cited for the selection of joint tenancy were the nature of the family situation, ease of transfer and reduction of death taxes. Although the first two reasons are sound and considered among the classic advantages of joint tenancy, the third reason is patently an invalid ground for choosing joint tenancy. The frequency with which this invalid reason is cited reinforces estate planners' complaints that ordinary property owners lack an adequate awareness about the effect of the ownership form.

III. LEGISLATIVE REFORM

The foregoing analysis has highlighted a number of areas in which legislative reform of joint tenancy law appears warranted. In the following discussion, an attempt will be made to draw these problem areas together and to suggest specific corrective measures that seem justified by present patterns of property ownership. These recommendations are presented in outline form with accompanying explanatory comments.

A. Authorization for Joint Tenancy Ownership in All Types of Property

The time has come to end the confusion and uncertainty so commonly associated with the creation of joint tenancies. What is required is a statute which recognizes the validity of joint tenancy ownership of *any* type of real or personal property and which spells out the requirements for creating a survivorship right.

1. *Creation between Husband and Wife: Joint Tenancy Presumed*

Property rules should be designed to assure realization of the intent of the ordinary property owner, not to protect against the rare eccentric. The co-ownership of today almost always involves a married couple.[205] Reliable indicators show that when a husband and wife own property together they intend a survivorship arrangement in the overwhelming majority of cases.[206] There is no good reason why the law should insist on a presumption against this intent. Therefore, it is recommended that the legislature declare survivorship to be the preferred construction in co-ownerships between spouses.

In according such joint tenancies favored treatment, the legislation should provide for the proof of a contrary intent. Thus, the present presumption in husband and wife co-ownerships would be reversed. Presumably, the existing body of law concerning the adequacy of evidence of intent would be relevant in determining when the presumption of joint tenancy is rebutted. A simple designation on the document of the parties as "tenants in common" or "without right of survivorship" should clearly suffice to overcome the presumption. One difficulty not directly solved by this statutory approach is the ownership of many types of tangible personalty where the issue is not a choice between co-ownerships, but rather between single and joint ownership. The legislature's sanction of husband-wife joint tenancies would seem to provide a respectable policy basis for resolving doubts in favor of co-ownership with survivorship.

It is realized that objections will be made to placing the legislative imprimatur on joint tenancies. However, it seems that husband and wife co-ownerships avoid the major dangers of the joint tenancy form. Loss of control is not a serious problem where the co-owners are married. Diversion of the property from the co-owner's family is not a significant problem since the co-owners generally have the same descendants.[207] Consid-

205. In the field study, 861 out of 918 items of personalty (93.9 percent) held in some form of co-ownership were held by husband and wife. *See* Appendix VI.

206. The earlier real estate study turned up 98 percent husband wife joint tenancies. *See generally* Hines, *supra* note 192.

207. This has always been one of the grounds used to explain the repugnancy of the survivorship feature of joint tenancy. *See* York v. Stone, 1 Salk. 158, 91 Eng. Rep. 146 (Ch. 1709); Nash v. Martin, 90 Ga. App. 235, 82 S.E.2d 658 (1954); Hoyt v. Winstanley, 221 Mich. 515, 191 N.W. 213 (1922).

eration was given to the advisability of limiting the presumption to husbands and wives having the same children, or to some other variation of the "preferred spouse"[208] concept. Allegiance to a policy of trying to make the law primarily responsive to the normal situation would seem to require the omission of such a limitation on grounds that it would unduly mar the simplicity of the statute. On the positive side, the ready availability of assets and the rapid title clearance possible through joint tenancy ownership both have special value to a surviving spouse.

Estate planners in particular will see dire results in an official preference for husband and wife joint tenancies. The marital deduction eases the tax disadvantages of joint tenancy between spouses, but it by no means eliminates them. If the fear is that expressing statutory favor for joint tenancy will beguile property owners into creation of unwise co-ownerships, the empirical data would suggest that most of the beguilement has already occurred.[209] It is hard to see how bringing the law in line with existing patterns of property ownership can greatly affect the estate planner's responsibility to use his best efforts to assure his client sound ownership arrangements. For the ordinary citizen whose estate is too small to require tax planning, the change in the law simply increases the chance that his informal planning devices will accomplish his intent.

2. *Creation between all other Co-owners: Requirement of a Writing Manifesting a Clear Intent to Create a Joint Tenancy*

The existing policy against survivorship rights is consistent with the normal intent of co-owners other than husband and wife and should be retained. The requisites for creating a joint tenancy should, however, be expressly indicated. One initial question that must be resolved is whether to permit joint tenancies among more than two persons. Multiple party joint tenancies are unusual[210] and a limitation to two parties would avoid some potentially sticky problems.[211] Nevertheless, given

208. *See* UNIFORM PROBATE CODE § 2-102 (Working Draft No. 5, 1968).

209. Appendix VI shows that less than 50 percent of the nonhusband and wife co-ownerships were joint tenancies. Similar findings were made in the earlier real estate study. Hines, *supra* note 192, at 617.

210. The current study uncovered only 19 cases of multiple ownership. *See* Appendix III.

211. One problem is the difficulty of ascertaining the respective interests of the parties; another is deciding the relationship between

sufficient safeguards, no great harm can be foreseen in permitting those who so desire to enter into multiple joint tenancies. The rule that death of one multiple joint tenant does not affect the relationship among the others seems so well settled[212] that specific recital in the statute would be unnecessary.

The statute should provide that a writing is required to create a joint tenancy, whether between two, or among multiple, tenants. This is generally the effect of the decisions,[213] but codification can do no harm. The statute should expressly state the language sufficient to create a survivorship right. All of the common expressions used to create joint tenancies could be sanctioned,[214] and if inflexibility is regarded as a problem, the statute could approve of any language evincing an intent to create a survivorship right. The statute should make clear that co-ownerships lacking a writing with the requisite language will not be accorded survivorship rights. It would thus be unnecessary to include any provision classifying ownerships failing to meet the statutory standard. Depending on the particular facts involved, such would either be tenancies in common or sole ownerships.

B. Legislative Coverage of Joint and Survivor Accounts

The uniqueness of the joint and survivor account justifies separate legislative treatment. Because the party creating a joint and survivor account often does not intend to make an irrevocable gift to the other co-depositors, it has been difficult to fit the joint account into the joint tenancy mold. Courts are gradually recognizing that the joint and survivor account is a property form not readily susceptible to explanation by, or enforcement under, existing legal doctrines governing other co-

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survivors after the death of one or two of the original parties. *See* Folsam v. United States, 306 F.2d 361 (5th Cir. 1962).

212. *See* 4 G. Thompson, Real Property § 1776, at 14 (1961); 2 American Law of Property § 6.1, at 7 (A. Casner ed. 1952).

213. Some states, however, seem willing to recognize an oral survivorship agreement. *In re* Estate of Louden, 249 Iowa 1393, 1397, 92 N.W.2d 409, 412 (1958); Peterson v. Lake City Bank & Trust Co., 181 Minn. 128, 231 N.W. 794 (1930); *In re* Whiteside's Estate, 159 Neb. 362, 67 N.W.2d 141 (1954); Estate of Gabler, 265 Wis. 126, 60 N.W.2d 720 (1953).

214. Thus, the terms "as joint tenants," "with right of survivorship," "not as tenants in common" and "payable to either/or the survivor," should be recited in the statute. *See also* Colo. Rev. Stat. § 76-1-5 (1963); Conn. Gen. Stat. Ann. § 47-14a (1960); Mont. Rev. Codes Ann. § 67-310 (1962); N.M. Stat. Ann. § 70-1-14.1 (1961); N.C. Gen. Stat. § 41-2.1 (1966); Utah Code Ann. § 57-1-5 (1963).

ownerships. Acceptance of this difference is the key to working out a system of joint account rules that will adequately serve the needs of property owners. Legislative assumption of the responsibility for recognition and regulation of the joint account offers the best hope for bringing order out of confusion.

Legislative reform of joint account law should have several important objectives. Achieving uniformity in the rule applied by the various institutions offering joint accounts is one essential goal. A second objective is the authorization of a sufficient variety of joint account arrangements with clearly distinguishable incidents to satisfy the ordinary requirements of account depositors. A third purpose is express declaration of the existence of a survivorship right in those account forms where it is intended.

1. *Scope of the Statute*

The act should be made applicable to all types of contracts of deposit[215] offered by any financial institution or other organization accepting investments. At a minimum, coverage should include accounts in banks, trust companies, savings banks, building and loan associations, savings and loan companies, credit unions, regulated investment companies and securities brokers.[216]

Further, it should be provided that the act is to be the exclusive standard for determining the validity and effect of joint account deposits within the jurisdiction. Treating joint accounts through separate provisions in various statutes which regulate the activities of financial institutions is confusing; uniformity can be achieved only through making the matter a part of the general property laws.[217]

2. *Creation of Statutory Account Forms*

A statute specifying the language to be used in a form document and providing for the effects of using such a form is a conventional legislative remedy for a problem in which ambiguity is frequent and disruptive. For each type of account al-

215. Accounts covered should include checking and savings accounts, certificates of deposit, share accounts and similar arrangements.

216. *See* UNIFORM PROBATE CODE § 6-101(4) (Working Draft No. 5, 1968) for a comprehensive definition of financial institutions.

217. Accordingly, existing provisions in various state statutes governing joint accounts should be specifically repealed by the reform legislation.

lowed, the statute should specify the formalities required to create the account and the rights of the parties and the institution holding the account.

Two questions are raised by the apparent rigidity of this statutory system. First, it might be argued that prescribing the content of account agreements unduly restricts the depositor's freedom to negotiate his own special arrangement. So long as the statute authorizes a sufficient variety of accounts to meet the usual needs of depositors, the cost to the public in reduced ability to pursue novel account ownerships is easily outweighed by the gain in certainty and simplicity.

Second, to what extent will account forms substantially but not exactly complying with the requirements of the statute be recognized as coming within the purview of the act? The statute could include a "substantial equivalence" phrase to indicate that forms meeting the spirit of the act are not to be disregarded for failure to be letter perfect.[218] Of course, deviation from an absolute adherence to the statutory language opens the door to disputes over the degree of similarity between the form and deviant document, and perhaps to arguments over the intent of the depositor using an irregular account form. This problem does not appear excessively troublesome. Once the statutory forms are enacted, firms offering joint accounts will naturally be quick to adopt them. Thus, the issuance of defective forms should soon be eliminated.

A problem is also apparent in the handling of accounts that clearly do not meet the statutory standards. Should the general co-ownership law be brought into play or should the statute specify the results of failure to create a recognized account form? Although it is tempting to assign to the courts the task of untangling defective accounts on the ground that the depositor's intent would be more likely to be achieved through such an approach, the corrective force of the statute would be strengthened by stipulating the result of a failure to meet the statutory joint account requirements. Thus, the statute should expressly provide that all accounts in the names of two or more persons which do not comply with the prescribed joint account forms will be deemed tenancy in common accounts. Besides foreclosing disputes over the effect of defective account arrangements per-

218. This technique is used in the North Carolina statute governing joint bank accounts with right of survivorship. N.C. GEN. STAT. § 41-2.1(g) (1966).

haps intended to create survivorship rights, such a provision would also implicitly sanction and clarify the status of the intended tenancy in common account occasionally used by business associates and families.

The recommended legislation should recognize three distinct types of multiple accounts: joint and survivor accounts, pay-on-death accounts, and convenience accounts.[219] A separate form for creating each account would be prescribed along with the formalities for creation. The effects of the account would be set forth only as they concern the rights of its holder to make payments and the ownership interests of the parties. Although some advantage may be seen in handling the effects of joint accounts on third party claimants, such as creditors and surviving spouses, in the special account law,[220] it seems preferable to defer that task to statutes covering a broader array of ownership forms.[221] The confusion which currently exists in co-ownership law is attributable in large measure to a tendency to create a separate set of rules for each type of ownership form. Rejection of this piecemeal approach in the joint account statute may encourage the enactment of needed broad-gauge reforms.

Contrary to the treatment in the general joint tenancy statute, no special recognition should be given husband and wife joint accounts. The principal reason for omitting such treatment is the desire to reduce the potential for confusion by limiting the number of forms to those absolutely essential. Providing that all husband and wife joint accounts are presumed to be subject to survivorship rights would not only necessitate two series of forms, but would also conflict with the basic pattern

219. Of course, the tenancy in common account is also indirectly authorized as a residuary multiple party account. No special account contract form need be specified, however, as any account in two or more names that does not comply with the statutory requirements for the three other types of joint accounts will automatically be deemed a tenancy in common account.

220. This approach is taken by the UNIFORM PROBATE CODE § 6-102-07 (Working Draft No. 5, 1968), and by N.C. GEN. STAT. § 41-2.1 (1966).

221. Where basic policy changes are involved, such as the subjection of the survivor's interest in joint tenancy property to claims of creditors and of the surviving spouse and dependents, it seems undesirable to effect the reforms only in so limited an area of property ownership as joint accounts. For example, it does not seem reasonable to subject the joint account to the statutory interest of the deceased depositor's spouse and not subject other joint tenancies and revocable trusts to the same claims. Reforms of this nature should be designed to reach all comparable holding forms. If they do not, they may simply cause a shift from one probate avoidance device to another.

of creating three distinct types of joint accounts. If the joint account statute is successful in transforming selection of a joint account form into a simple and efficient process having a high correlation between depositor intent and account effect, the need for a special treatment of husband and wife account ownership is not as great as in the general joint tenancy area.

(a) Joint and Survivor Accounts

The statute should contain express authorization for the creation of accounts in the names of two or more persons, payable to any of them, or to the survivor. Consideration could be given to restricting the joint account form to two depositors; however, this is inconsistent with current practice and with the law in nearly every state.[222] The right of any joint depositor to make withdrawals at any time should be clearly spelled out in the form along with an explicit declaration of the statutory survivorship right.

To create such a joint and survivor account, the account agreement must be substantially the same as the prescribed form and must be signed by all parties. The requirement of all parties' signatures changes the present law in the states[223] which permit a nonsigning donee to take by survivorship. Because the terms of the suggested account form grant all named depositors lifetime powers to draw on the account, compelling all parties to sign seems not only reasonable but necessary. If the parties desire a survivorship account wherein only one party has the right to make withdrawals, the pay-on-death form should be used.

The statute should protect a bank which honors any withdrawal by a person named in the account, and should specify the rights of the co-depositors in the account. It is suggested that the legislation provide that the interests of the co-depositors among themselves are to be determined on the basis of contributions, with the proviso that in the absence of satisfactory proof of contributions, the amounts in the account shall be deemed owned by all equally. This provision more or less codifies existing law, and is consistent with both the tax law and the pro-

222. *See, e.g.*, ARK. STAT. ANN. § 67-521 (1966); COLO. REV. STAT. ANN. § 14-3-6 (1963).

223. *See* Barbour v. First Citizens Nat'l Bank of Watertown, 77 S.D. 196, 86 N.W.2d 526 (1957); Kelberger v. First Fed. Sav. & Loan Ass'n of LaCrosse, 270 Wis. 434, 71 N.W.2d 257 (1955).

posed creditor's rights legislation. It should be helpful in avoiding litigation over ownership rights in accounts.[224]

(b) Pay-on-Death Accounts

For too long the law has concerned itself with academic present interest requirements and statute of wills technicalities and refused to sanction what the property-owning public really wants—a simple and reliable device for transferring funds from a decedent to a survivor without creating lifetime rights in the donee. In theory, the pay-on-death form fits the bill perfectly, and its practical feasibility has already been demonstrated in relation to several types of investments.[225] Concern for the sanctity of more formal testamentary transfer devices seem hollow in view of what is accomplished through existing probate avoidance devices.[226] The proposed legislation should authorize general use of the pay-on-death account.

The pay-on-death account form is designed to serve the intentions of the many depositors who desire the survivorship feature of the joint and survivor account, but do not want to surrender control of the property during their lifetime. Under the terms of the prescribed pay-on-death deposit contracts, the account is the sole property of the depositor during his lifetime and subject to withdrawals only by him, but at his death it is payable in equal shares to the named beneficiary or beneficiaries. By using the pay-on-death account, the depositor need not worry, as he now must with the joint and survivor form, that the intended beneficiary might obtain possession of the passbook or otherwise reach the account during the depositor's lifetime.

The pay-on-death form also caters to the whims of the depositor who does not want the intended beneficiary to know of the possible gift. The account need only be signed by the depositor. However, because this account arrangement brushes uncomfortably close to a purely testamentary transfer, a greater than usual formality should be considered lest the departure from the policy of the wills acts appears too large. Having the depositor's signature witnessed by one disinterested party might

224. For appropriate language, see UNIFORM PROBATE CODE § 6-103-04 (Working Draft No. 5, 1968).

225. The United States Savings Bond is for many purposes a pay-on-death arrangement. *See generally* Barber & Segatto, *Joint Tenancy Property and Estate Planning*, 1959 U. ILL. L.F. 1022.

226. *See* Wellman, *The Joint and Survivor Account in Michigan—Progress Through Confusion*, 63 MICH. L. REV. 629, 637, 653, 661 (1965).

be one reasonable concession to both formality and practicality;[227] requiring notarization of the signature would also impart some note of deliberation without unduly encumbering the opening of accounts.

Some commentators[228] prefer to bring about the objectives of the pay-on-death account through recognition of the Totten trust.[229] It does not seem, however, that the bank account trust possesses any desirable feature not also found in the simple pay-on-death account. If the legislature is to approve such highly testamentary arrangements, it would seem better to do so directly and simply through the pay-on-death device than through the more complex and confusing bank account trust.[230] If the pay-on-death account receives legislative approval, consideration could be given to the elimination of the bank account trust.[231]

(c) Convenience Account

In most states, the law does not presently provide a simple device to meet the needs of the individual who desires to take precautions against his own future disability or incompetence. What this person desires is normally analogous to a revocable trust. He wants an arrangement whereby the property is owned solely by him, but is subject to some powers in a designated person to apply the assets for the owner's benefit. While such a person can create a trust, execute a power of attorney authorizing another to act in his behalf or, where permitted, appoint a standby conservator, these techniques are not practical solutions for the unsophisticated small property owner. Each alternative necessitates professional assistance which the property owner with mod-

227. If this requirement is established, some definition of "disinterested person" will be required. Maximum assurance of objectivity would be achieved by requiring the signature of some person not employed by the institution handling the account.

228. *See* UNIFORM PROBATE CODE § 6-107, comment (Working Draft No. 5, 1968).

229. *See In re* Totten, 179 N.Y. 112, 71 N.E. 748 (1904); RESTATEMENT (SECOND) OF TRUSTS § 58 (1959). *Cf.* note 159 *supra.*

230. For discussion of the problems incident to the Totten trust, see Note, *Totten Trust: The Poor Man's Will*, 42 N.C.L. REV. 214 (1963); Note, *Totten Trust-Judicial Midwifery*, 14 N.Y.U. INTRA. L. REV. 63 (1958); Comment, *Totten Trusts in Kansas*, 9 U. KAN. L. REV. 46 (1960); Comment, *Trusts: The Totten Trust in Florida*, 10 U. FLA. L. REV. 235 (1957); 1 A. SCOTT, TRUSTS §§ 58.2-58.6 (1967).

231. This result could be accomplished by a statute declaring that the title to any property or account held in the name of the owner as trustee shall be deemed to belong solely to the owner unless the terms of the trust are adequately stated in the transfer document or in a separate instrument.

est assets is not likely to seek. The power of attorney is further limited by the rule that it is revoked by incompetency like any other such agency agreement.[232] Currently, if the person concerned about his future ability to manage his funds seeks to achieve his objectives through an account arrangement, he is unlikely to succeed and he runs a risk of subjecting his property to an unwanted survivorship right. If there is a legislative disposition to do so, self-protective intentions could be realized through the creation of a convenience account rider to be placed on any regular account.

The terms of the convenience rider would make clear that the general nature of the account is not changed by the addition of the rider. The sole effect of the rider would be to permit the depositor to designate a person authorized to make withdrawals from the account on behalf of the depositor. The signature of the authorized convenience withdrawer would be required on the account form. The holder of the account would be specifically protected for any payments made to the authorized person until such time as the authorization is revoked in writing by the depositor. The statute should also provide, of course, that the authorization of the convenience party is not revoked by the incompetency of the principal depositor.[233] The form of the rider would conclusively rebut any claim of an interest in the account by the party authorized to withdraw, and hopefully would eliminate the family squabbles that now arise over alleged convenience accounts held in an inconsistent form. The convenience account approach has obvious advantages over the nonsurvivorship joint account sometimes recommended in this area.[234] Under any joint account arrangement, disputes concerning the extent of the interest of the convenience party may still arise. On its face such an arrangement seems to create a tenancy in common, so it could easily result in a post-death claim by the other party (or the other party's estate) to a one-half interest in the account.

C. Creditors Rights in Joint Tenancy

1. *Inter Vivos*

Quantitative uncertainty is the major flaw in the creditor's

232. *See* Wellman, *supra* note 226, at 667.

233. *See* W. Seavey, Agency § 48 (1964); F. Mechem, Outlines Agency § 277 (4th ed. 1952).

234. *See* Kepner, *Five More Years of the Joint Bank Account Muddle*, 26 U. Chi. L. Rev. 376, 404 (1959); Wellman, *supra* note 226, at 666.

ability to reach assets held in joint tenancy by a surviving debtor. Therefore, the primary thrust of legislation in this area should be to clarify the rules for determining the extent of such a debtor's interest. The fairest rule seems to be one where the interest would depend on the extent of the debtor's contributions. Even a statute which simply states such a rule would be an improvement in many jurisdictions; but to take a healthy stab at meaningful reform, the act should address such questions as how "contribution" should be defined, what stand should be taken on presumptions of fact and who should ultimately bear the burden of proving contributions. The definition of contribution must take into account the possibility of growth or depreciation in the jointly held property as well as the effect of partial withdrawals.[235] Although arguments can be made for each of the positions concerning burden of proof, it would be difficult to justify a rule that requires the creditor to prove the debtor's contributions. It seems equally unjust to presume total contributions by the debtor and thereby force the other co-owner to prove his own contribution. The best rule would presume contributions to be equal in the absence of adequate proof to the contrary.[236] This permits either party to prove that contributions were unequal. If the debtor's apparently equal co-ownership interest is to be reduced, the burden of proof is on the party most likely to be able to produce the necessary evidence.

The legislative revision should also specify the point in the collection process at which a survivorship right is severed. Any juncture up to the final issuance of the sheriff's deed is arbitrary in the sense that the debtor could still redeem the property by paying the debt. Nevertheless, it is unconscionable to keep the creditor's recovery in jeopardy until the unity of title is severed. The sale on execution seems a reasonable point at which to declare a severance. If a rationale is required, a good argument can be made that the unity of interest is in fact severed at that point.[237] To avoid unnecessary prejudice to the other co-owner,

235. Consider the following definition:

> "Contribution" of a party as of any given time is the sum of the values of all money and property deposited or invested by or for him adjusted for his proportionate share of gain or loss and any income retained therein less the sum of the values of all withdrawals of money and property made by or for him.

236. This is the approach adopted in relation to creditor's rights in joint accounts by the UNIFORM PROBATE CODE §§ 6-101, 6-103-04 (Working Draft No. 5, 1968) and by N.C. GEN. STAT. § 41-2.1(b)(2) (1966).

237. *See* Swenson & Degnan, *Severance of Joint Tenancies*, 38 MINN. L. REV. 466, 493 (1954).

it could be expressly provided that the survivorship right is revived by a subsequent satisfaction of the creditor's claim through redemption or other process which results in restoration of the property to the debtor. Marking the point of severance becomes less critical under the changes in the creditor's rights after death as noted below.

2. *After Death*

Enlarging and clarifying the rights of claimants against property owned by a deceased joint tenant requires both the adoption of a new legal stance toward probate avoidance techniques and a new set of collection procedures. The recommendations below are premised on acceptance of a general policy that property in which the owner had substantial beneficial ownership interest up to the time of his death and which was transferred through a probate avoidance device should be subjected to the claims against the deceased transferor. In the joint tenancy area this policy is generally sought to be implemented by disregarding the factor of death and attempting to award the claimant the same interest in joint tenancy property after death as he would have had immediately before. Permeating the suggested reforms is the concept of the desirability of achieving equitable treatment for claimants against a deceased joint tenant or his estate with the least impairment of the utility of the joint tenancy form of ownership.

(a) Liens not Tolled by Death

Initially, the continuing validity of liens created by claims against the deceased co-owner should be clearly established, for the death of the debtor should not affect the enforceability of valid liens that have attached to his property. An express statement that the enforceability of the lien is neither diminished nor enhanced by the joint tenant's death should suffice to achieve the desired result.[238]

(b) Rights of General Creditors

(1) The Principles

As in the case of the secured creditor, fairness is best achieved by assuring generally that the creditor's rights to reach

238. *See* CONN. GEN. STAT. ANN. § 47-14f (1960); NEB. REV. STAT. § 30-624 (1964).

the property are neither reduced nor enlarged by the debtor's death. Therefore, it is recommended that a creditor should be permitted to pierce the survivorship arrangement to satisfy a claim against a deceased joint tenant. If the creditor could have attached, garnished or executed upon the property during the debtor's life, he should be allowed to continue to rely on his debtor's interest after the debtor's death. Of course, the creditor's claim should never exceed the deceased co-owner's lifetime interest in the asset,[239] and the legislation should expressly so state.

Well-defined rules governing a creditor's rights to reach joint tenancy assets during the debtor's lifetime are obviously critical to effectuate a reform plan based on preservation of such rights. Suggestions for a workable inter vivos doctrine were made above and need not be reiterated here other than to suggest the advantage of having a unified policy before and after death for ascertaining a person's interest in jointly owned property subject to levy or garnishment by his creditors.

(2) The Procedures

Additional questions revolve around whether the intended collection process should be spelled out in detail and some mechanism provided to facilitate the assertion of claims. It would be possible simply to subject joint tenancy property in the hands of the survivor to the debts of a deceased co-owner and let the parties and the courts fill in the interstices.[240] If the discussion that follows does not exhaust the possible substantive and structural issues raised in designing a collection procedure, it should at least demonstrate that there are too many potentially troublesome problems to leave the development of procedures to chance.

239. Both the Nebraska and South Dakota statutes expressly subject the creditor to all homestead and legal exemptions in the jointly owned property. NEB. REV. STAT. § 30-624 (1964); S.D. COMP. LAWS § 30-21A-1 (1969). It is not clear whether this exception relates to exemptions that were claimed by the decedent or exemptions claimed by the survivor. If, in the hands of the survivor, the property is not exempt from execution, it is difficult to justify denying a creditor the right to reach a proportionate share of the property on grounds that the property was exempt in the hands of the decedent.

240. This is more or less the policy of the UNIFORM PROBATE CODE § 6-102-04 (Working Draft No. 5, 1968). It is also the approach of the North Carolina statutes on bank accounts and corporate securities. N.C. GEN. STAT. §§ 41-2 (1963) (bank accounts); § 25-8-407 (Supp. 1967) (corporate securities).

The resolution of several major issues is essential to the development of a serviceable set of procedures enabling claimants to reach joint tenancy property. Recent statutes enacted in several states[241] offer, at best, spotty guidance for steering a course through the complexities of this area. The first crucial question is whether the claimant's right is to be against the survivor personally, against the property, or against both. The claimant, of course, would be afforded maximum protection if he had rights against both the property and the survivor. On the other hand, if the survivor's own liability is to be minimized, limiting the claim to an in rem action against the property would seem to be the best course. However, both of these approaches jeopardize one of the valuable attributes of joint tenancy—the survivor's ability to transfer a clear title to the property promptly.

Subjecting the property itself to creditors' claims would potentially restrict the survivor's power to alienate any asset taken through joint tenancy and represented by a title document, most notably real estate. A potential purchaser would undoubtedly insist on proof that the property would not be attached by claimants against the deceased co-owner. Furnishing satisfactory proof of freedom from creditors' claims could be very difficult, much more so, for example, than proving the absence of tax liens.

One means of dealing with this problem is to limit the time in which claimants can reach joint tenancy property.[242] This solution simply reduces the degree of inconvenience to the survivor who intends to transfer his interest, but it would seem essential to avoid congestion in real estate transfers. A more direct course of action to relieve hardships would be to expressly free from the possibility of claims property in the hands of a transferee for value who has taken from the survivor.[243]

The simplest route around the transferability problem is to

241. *See* NEB. REV. STAT. § 30-624 (1964); N.C. GEN. STAT. § 41-2 (1963); S.D. COMP. LAWS § 30-21A-1 (1969).

242. *See* NEB. REV. STAT. § 30-624(1) (1964); S.D. COMP. LAWS § 30-21A-2 (1969).

243. It should be made clear that the purchaser need not be without notice to take free of possible creditor claims. It is doubtful that a purchaser of real estate or corporate securities from a surviving joint tenant could avoid constructive notice of the possibility of creditor claims. *Cf.* Guerin v. Sunburst Oil & Gas Co., 68 Mont. 365, 218 P. 949 (1923); Brinkman v. Jones, 44 Wis. 498 (1878); Johnson v. Williams, 37 Kan. 179, 14 P. 537 (1887).

assign personal liability to the survivor and avoid subjecting the property itself to claims. The survivor's liability would be limited by the value of the deceased co-owner's interest in the property at the time of his death. The two states which have recently enacted special statutes governing creditor's rights against joint tenancy property generally employ this technique except that they link the survivor's liability to the decedent's contribution to the joint tenancy determined as of the time of death.[244] This rule does not appear sound since it denies the claimant the benefit of his debtor's gain from a good investment. Tying the survivor's liability to the value of the decedent's interest at death provides a fairer approximation to the position the creditor would have enjoyed had death not intervened. Either formulation of this approach places on the claimant the risk of the survivor's insolvency. It also imposes on the survivor the risk of the post-death market. For example, the property could be accidentally destroyed shortly after the debtor's death. Hardship situations could, however, be avoided by permitting the survivor to elect to renounce his survivorship right,[245] in which case his interest would be reckoned as if the deceased co-owner were still alive. An even more direct cure would be to limit the survivor's liability to the value of the decedent's proportional interest in the joint tenancy property either at the time of his death or at the time the claim is asserted, whichever is less.

As will become apparent, working out the enforcement of claims against a deceased joint tenant solely in terms of the personal liability of the survivor complicates the design of collection procedures in comparison to directly subjecting the property to creditor process; however, the preservation of free transferability of the property by the survivor seems well worth the complication. Even though the result should be clear, the statute should expressly exclude from liability bona fide purchasers from the survivor.

A second question concerns the circumstances under which joint tenancy assets will be subjected to claims against the deceased co-owner. The favored alternative is to restrict the

244. NEB. REV. STAT. § 30-624(1) (1964); S.D. COMP. LAWS § 30-21A-4 (Supp. 1969).

245. Such a provision would be a legislative innovation; the courts, however, have occasionally approved such renunciations. *See* Bradley v. State, 100 N.H. 232, 123 A.2d 148 (1956) where a surviving joint depositor was allowed to renounce her interest and avoid inheritance tax.

vulnerability of joint tenancy property to situations in which the estate of the deceased is insolvent. This is the approach taken by both states that have enacted special statutes concerning creditors' post-death rights in joint tenancy.[246] Permitting claimants to reach the assets only in cases of insolvency offers full protection to the claimant while doing a minimum of violence to the surviving joint tenant's expectations.

If it were decided to subject surviving joint tenants to debts in both solvent and insolvent estates, the administrative complications would be severe, but probably not overwhelming. An abatement order would have to be established between estate assets and survivorship assets. If joint tenancy property were assigned a low abatement priority, estate fiduciaries could be put to a great deal of inconvenience in trying to collect assets in the possession of survivors. If survivorship assets were equated to specific devises and legacies, seemingly the most reasonable approach, it is unlikely the responsibility for paying estate debts would be significantly shifted in most estates. The principal objection to extending the survivor's liability to the debts of solvent estates is that it represents a great incursion into the probate avoidance feature of joint tenancy but adds nothing to the protection of estate creditors.

Even if claimants are permitted to reach joint tenancy property only in insolvent estates, a question still arises as to what extent the joint tenancy property will be brought back into the estate. For instance, if estate debts exceed estate assets by 1000 dollars, can only 1000 dollars of joint tenancy property be reached to pay debts, or is the entire interest of the decedent in the jointly owned property reachable? Again, because the primary thrust of the legislation is to protect creditors, not to upset joint tenancy ownerships, the statute should provide that only so much of the joint tenancy property can be reached as is necessary to pay claims remaining after assets in the probate estate are exhausted. Adoption of this approach makes it unnecessary to face questions concerning the abatement priority to be assigned joint tenancy property in relation to estate assets. Abatement problems could still arise, however, in cases of a multiple party joint tenancy or where the decedent was a joint tenant of several assets with different persons. The act should either provide that all survivors contribute ratably to

246. NEB. REV. STAT. § 30-624(3) (1964); S.D. COMP. LAWS § 30-21A-5 (Supp. 1969).

make up deficiencies in the estate's ability to pay claims or equate joint tenancy assets to other estate property for purposes of establishing an abatement order.[247]

The third issue concerns the claims to which joint tenancy property may be applied. Will the survivorship right be subject only to debts in existence at the co-owner's death, or may estate expenses and charges also be asserted? Strict adherence to the concept of ignoring the fact of death in enforcement of claims would seem to deny recognition of estate expenses since they arise only by reason of the joint tenant's death. State probate codes, however, uniformly accord such claims a priority over ordinary debts of the decedent.[248] The two state statutes dealing specifically with creditors subject the survivorship interest to "debts and obligations"[249] of the decedent. The North Carolina statutes governing joint bank accounts and joint registration of securities subject jointly owned assets to claims of creditors and to governmental rights.[250] It seems unlikely that any of these acts would be construed to include expenses of administration. Why these statutes do not include estate expenses is not clear, but no good reason appears to justify the donee in a probate avoidance transfer taking his interest free of the expenses resulting from the donor's death.[251] Therefore, it is recommended that the statute expressly subject the survivor to liability to pay expenses and charges of administration. The estate fiduciary should be authorized to pursue whatever procedures are necessary to enforce the claims against the survivor. Estate expenses and charges for which the survivor would be responsible would include court costs, administration expenses, funeral and burial expenses, expenses of decedent's last illness and taxes other than death taxes. The allowance to a surviving spouse would presumably be a claim enforceable against a surviving joint tenant in jurisdictions that designate such a payment an estate expense.[252] In assessing the severity of subjecting the survivor to

247. Presumably, a survivor's interest in joint tenancy property would be at least equivalent to that of a specific devisee under the decedent's will. For what this would mean in terms of abatement see, UNIFORM PROBATE CODE § 6-109 (Working Draft No. 5, 1968).

248. *See* 2 P-H ESTATE PLANNING, WILLS, TRUSTS ¶ 2652 for statutory material of each state.

249. NEB. REV. STAT. § 30-624 (1964); S.D. COMP. LAWS § 30-21A-1 (Supp. 1969).

250. N.C. GEN. STAT. §§ 41-2.1(3) (1966) & 25-8-407(c) (Supp. 1967).

251. *See generally* Wellman, *supra* note 226.

252. *See* 2 P-H ESTATE PLANNING, WILLS, TRUSTS ¶ 2734 for statutory material of each state.

such claims, it should be remembered that the liability is limited to situations where the estate is insolvent. Whether the survivor would also be liable for the payment of estate taxes would depend upon the local rule on apportionment of such taxes.[253]

The fourth issue is whether claimants should proceed through an estate administration or go against the survivor separately to reach joint tenancy property. The latter procedure is prescribed in the Nebraska and South Dakota statutes,[254] but it should be noted that neither of these acts make the survivor liable for estate expenses and charges. Reliance on actions outside estate administration necessitates the creation of special presumptions on the question of insolvency of the estate[255] and generally seems a less secure method of treating claimants equitably.

Therefore, it is recommended that the legislation specifically provide that the survivor be liable to the estate representative for the payment of the deceased joint tenant's debts and estate expenses and charges. The liability of the survivor can be enforced under the general powers conferred on the personal representative to collect assets of the estate. Reliance on the estate administration process avoids the need for any special notice to the survivor by claimants intending to rely on the liability created by the act. If the estate is insolvent, the personal representative will be obligated to assert the claim against the survivor to the same degree as he is required to collect from any other debtor of the estate.

It may be argued that restricting claimants to reaching joint tenancy assets in this manner will result in the opening of estates that otherwise do not justify administration. This may be so, but the risk seems a reasonable price to pay for the assurance of orderly collection of assets subject to claims and fair allocation among claimants. In an insolvent estate where no other reason for administration exists, the claimant's power to reach joint tenancy assets may be a sufficient lever to extract

253. *See id.* ¶ 2667 for statutory material of each state.

254. NEB. REV. STAT. § 30-624 (1964); S.D. COMP. LAWS § 30-21A-1 (Supp. 1969).

255. For example, the South Dakota Act obscurely provides:

> [I]f no petition is filed in court to probate the deceased joint owner's estate within thirty days from the date of his death, there shall be a presumption of evidence that the property standing in the name of decedent at the time of his death was insufficient to pay his debts and obligations.

S.D. COMP. LAWS § 30-21A-3 (Supp. 1969).

payment from a survivor who does not wish to have his interest exposed to potentially greater liability for other estate expenses.

A related question is whether a third party who holds assets which are owned in joint tenancy should be temporarily prohibited from releasing them to the survivor so that claimants can be assured a fair chance of finding the assets before they are dissipated. For example, should financial institutions be required to retain the proceeds in a joint account for a specified period after receiving notice of the death of one depositor? Here again, conflict is created between the interest of maintaining ready accessibility to jointly held property and that of affording maximum protection to claimants. A decision to temporarily impound such assets necessitates the creation of rules governing the type of notice of death, the holding period, the procedure for obtaining a release of the assets and the liability of the third party for improper payment.[256] Special treatment of surviving spouse joint tenants might also be considered.[257] On balance, the added complexity of adopting such a plan coupled with the earlier recommendation to rely solely on the survivor's personal liability leads to the conclusion that joint tenancy's advantage of making assets promptly available to the survivor should be retained by permitting immediate release of the assets. The survivor's personal liability is not affected by his expenditure or transfer of the property.

It is questionable whether provision should be made for a special time period limiting the personal representative's right to assert a claim against a surviving joint tenant. Both Nebraska and South Dakota have restricted the duration of the survivor's liability to a relatively short period.[258] The reason for setting such a period is not clear, but is probably based on a combination of the ancient insistence on creditor diligence and a vague notion that it is undesirable to give such extraordinary procedures a very long lease on life. In the absence of more compelling

256. *Compare* IOWA CODE ANN. § 534.11(8) (Supp. 1969) where a six month holding period is provided for savings and loan accounts, *with* N.C. GEN. STAT. § 41-2.1(b)(4) (1966) where a deceased joint tenant's portion of a joint account is to be paid to his representative to be held for payment of government and creditor claims.

257. The notion is that immediate release of a limited sum to a surviving spouse might be authorized to enable the decedent's family to meet current expenses.

258. NEB. REV. STAT. § 30-624(1) (1964) (three months after death of deceased joint owner); S.D. COMP. LAWS § 30-21A-2 (Supp. 1969) (six months after death of deceased joint owner).

grounds, it seems difficult to justify terminating the liability of a joint tenant earlier than the time when ordinary claimants are barred from asserting claims against the estate.

Restricting the claim to a personal action against the survivor obviates the need for a short period to facilitate transferability. Regular statutes of limitation on the underlying claims and debts will operate to limit the duration of the survivor's liability. Furthermore, requiring the claimant to utilize the estate administration procedure does incorporate a time limit of sorts in most states through the general restriction placed on the period in which administration may be opened.[259] For these reasons, no time limit on the survivor's liability is recommended.

D. Effect of Legislative Reform: Prospective or Retroactive

A final question to be examined is whether the proposed statute should apply prospectively only or whether an attempt should be made to apply them to existing ownership arrangements. Before exploring questions concerning the necessity or desirability of retroactive application, some inquiry into the constitutionality of such a provision seems in order.

1. *Constitutional Questions*

No serious constitutional argument can be made to prevent giving the creditors' rights proposal immediate effect. A surviving joint tenant's claim that he has a vested right to take jointly owned property free of the claims of the deceased co-owner's creditors would in all likelihood fail.[260] The several statutes subjecting survivorship interests to creditor claims have encountered no constitutional challenges.

The legislation changing the ground rules governing the recognition of joint tenancies between spouses presents a more difficult question. The argument for unconstitutionality would be based on the proposition that a co-owner has a right to have the nature and extent of his interest determined under the law as it existed at the time his ownership was created.[261] Thus,

259. *See* 2 P-H Estate Planning, Wills, Trusts ¶ 2610 for each state.

260. *See* L. Simes & C. Taylor, The Improvement of Conveyancing by Legislation 257-58 (1960); J. Scurlock, Retroactive Legislation Affecting Interests in Land 8-10 (1953).

261. *See* Noyes v. Parker, 92 F.2d 562 (D.C. Cir. 1937) where it was held that a statute abolishing joint tenancies or converting them into tenancies in common applies only to future and not to past acts or conveyances, and does not affect joint tenants whose rights had become

where the decedent husband was a co-owner with his wife in an ambiguous arrangement, the estate's representative could urge that the husband's interest as a tenant in common was vested under the former law and could not be altered by subsequent legislation instituting a presumption of joint tenancy.

If the legislature determined that as between married co-owners the existing presumption against joint tenancy was based on erroneous assumptions of fact and that the public interest would be advanced by reversing the legal presumption, it is unlikely that the statute's application to existing co-ownerships would be held invalid under substantive due process standards.[262] Such an act extinguishes no established interest; it merely changes the evidentiary presumption used to determine the nature of ownership.[263] Furthermore, enactment of the statute would be notice to all married co-owners that henceforth they will be presumed to be joint tenants. Any married co-owner who wishes to hold property in other than joint tenancy is free to rearrange his affairs.

Although perhaps unnecessary, provision for a reasonable grace period between enactment and the effective date for reversal of the presumption would increase the probability that the legislation would be sustained.[264] For example, the statute could apply to all husband and wife co-ownerships created after enactment, but not to existing joint tenancies until a year (or perhaps two years) after enactment. Such a deferral would allow married co-owners who intend a tenancy in common to ascertain the status of the existing arrangement and make necessary alterations. Deferral substantially removes the spectre of the co-owner dying shortly after the statutory change without having had any real chance to evaluate his ownership arrangement. Similar but more difficult federal constitutional questions would be raised by applying the proposed multiple account statute to existing accounts. If this legislation were given retro-

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vested prior to passage of the statute. *See* J. SCURLOCK, *supra* note 260, at 325-29 where it is asserted that restoration of the common law presumption in favor of joint tenancy would create more cogent constitutional objections than were raised by the statutes abolishing the presumption.

262. *See* Ferguson v. Skrupa, 372 U.S. 726 (1963); Goldblatt v. Hempstead, 369 U.S. 590 (1962); Williamson v. Lee Optical, 348 U.S. 483 (1955). *See also* Dunham, *Griggs v. Allegheny County in Perspective: Thirty Years of Supreme Court Expropriation Law*, 1962 SUP. CT. REV. 63.

263. *See* L. SIMES & C. TAYLOR, *supra* note 260, at 258-59.

264. *See* J. SCURLOCK, *supra* note 260, at 73-85; L. SIMES & C. TAYLOR, *supra* note 260, at 263-70.

active effect, many existing joint account agreements might fail to create the intended co-ownerships. To alter the law governing the effect of these completed contracts of deposit would seem to raise more serious due process questions than reversal of the presumption applied to co-ownerships generally.

The multiple bank account legislation must also overcome the article I, section 10 prohibition of impairment of contract obligations. Since *El Paso v. Simmons*,[265] however, it seems doubtful that this clause has any real identity independent of the concept of substantive due process. The contract and due process clauses seem to have coalesced in terms of the standards of reasonableness by which state legislation is evaluated,[266] and it seems that a court would look favorably on a fair deferral period.[267]

Under state constitutional law the validity of the proposed reforms is somewhat less certain. State constitutions generally contain both due process provisions and prohibitions against impairment of contract obligations. Traditionally, both of these limitations on legislative power have been interpreted more broadly by state courts than have the parallel federal provisions.[268] Nevertheless, if the proposed changes include a reasonable grace period, it is difficult to see how any challenger could sustain the burden of showing the direct detrimental financial reliance on the former law which is ordinarily required to strike down retroactive legislation on either due process or impairment of contract grounds.[269] The simple fact is that if the co-owners are permitted a reasonable time to adjust their arrangements and fail to do so, their own lack of diligence, not the legislative change, causes the loss.

2. *Policy Questions*

Assuming that no constitutional objections bar the retroac-

265. 379 U.S. 497 (1965). *See also* Home Building & Loan Ass'n v. Blaisdell, 290 U.S. 398 (1934).

266. *See* Hale, *The Supreme Court and the Contract Clause*, 57 HARV. L. REV. 512, 890 (1944).

267. *See* L. SIMES & C. TAYLOR, *supra* note 260, at 263-70; J. SCURLOCK, *supra* note 260, at 82, 327.

268. *See* Paulsen, *The Persistence of Substantive Due Process in the States*, 34 MINN. L. REV. 91 (1950).

269. *See* Hetherington, *State Economic Regulations and Substantive Due Process of Law*, 53 NW. U.L. REV. 13, 22 (1958). *See also* J. SCURLOCK, *supra* note 260, at 327 where it is noted that statutes giving joint bank accounts conclusive effect as to ownership have been upheld as being similar to statutes of limitations.

tive application of the proposed reforms, it nevertheless seems doubtful that as a matter of policy the statutes should be so designed. The basic drawback is that there is a potential for frustration of ownership expectations. Furthermore, it is questionable whether the proposed statutes relating to joint tenancy creation and joint accounts require retroactive application to achieve their objectives. The immediate impact of new legislation which is prospective only will almost certainly be to stimulate, among co-owners, a re-examination of their holding arrangements. Outside of the bank account area, it seems reasonable to expect that the legal folklore will quickly assimilate the legislative message that survivorship is the norm among husband and wife co-owners. The empirical data suggest that this is unlikely to startle the typical married property owner.

As regards bank accounts, the mutual advantage that both depositors and financial institutions will find in the new law can be counted upon to phase out the old account cards quite rapidly. In many jurisdictions, judicial handling of joint account cases seems to be moving in a direction consistent with the objectives of the proposed legislation, so there is no great disadvantage in leaving to the courts the resolution of the validity and effect of existing co-ownerships. It might be somewhat confusing to live with two sets of laws relating to co-ownerships, but attorneys, at least, have become accustomed to such complications.[270] It might be considered whether a simple procedure should be offered whereby property owners could bring existing co-ownerships within the purview of the new legislation.[271] Such a provision would seem unnecessary for joint bank accounts in view of the ease with which the account contract may be revised.

The creditor's rights legislation stands on a different footing. The common law rules currently applied are grossly unfair to the creditor of a joint tenant. Assuming the absence of substantial constitutional objectives, every effort should be made to put this long overdue reform into immediate effect.

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270. For example, probate law changes and tax law revisions often provide for separate treatment of existing arrangements. *See, e.g.*, INT. REV. CODE of 1954, § 2041(a)(1).

271. This technique has been utilized in relation to joint tenancy ownership of corporate securities. *See* ME. REV. STAT. ANN. tit. 33, §§ 902, 904 (1964).

V. CONCLUSION

Roscoe Pound's charge to lawyers to look "more to the working of the law than to its abstract content"[272] seems especially significant for today's property law researcher. In the establishment of a factually accurate frame of reference for reforming ownership and transfer laws, the practices and attitudes of current owners seem at least as relevant as the a priori impressions of an ancient legislature or some jurist long in his grave.[273] Empirical research in this study has revealed that the major features of the current law dealing with joint tenancy fail to accord with the wishes of most property owners. Certainly no one would argue that the only function of law is to enable people to do what they wish; in many areas the law must prevent people from doing what they wish in order to protect the interests of others. But in the area of joint tenancy, there seems to be little reason for maintaining current policies essentially at odds with property owners' desires. Legislative reform as proposed herein would go far in bringing this law into line with the intention of property owners while at the same time safeguarding the rights of creditors and other interested persons.

APPENDIX

In the appendices which follow, results are presented in tables which show the incidence of joint tenancy usage by the variables of property type, occupation, age, value, the relationship of the joint owner and the reasons for selecting the form. The tables are constructed in such a way as to focus attention on the property owned rather than the owners. Therefore, they show the frequency with which the particular variables studied were present for each type of property. The frequency of a particular variable is shown in raw numbers, except in large tables where percentage figures facilitate understanding.

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272. Pound, *Scope and Purpose of Sociological Jurisprudence*, 25 HARV. L. REV. 489, 512-13 (1912).

273. *See* Kalven, *The Quest for the Middle Range: Empirical Inquiry and Legal Policy* in LAW IN A CHANGING AMERICA 57 (Hazard ed. 1968); Hazard, *The American Bar Foundation Program for Assisting Law Review Research*, 12 ST. LOUIS U.L.J. 418, 419 (1968); Berger, *The Research Frontiers of Real Property Law: Commercial Land Transfers*, 15 J. LEGAL ED. 282, 285 (1963).

APPENDIX I

Holding Forms of All Property (in percentages)

	Property Type	Total	Joint Tenancy	Tenancy in Common	Multiple Ownership*	Sole Ownership by Husband	Sole Ownership by Wife	Other	No Response
1	Home Farm	82	67.1	9.8	0.0	19.5	2.4	0.0	1.2
2	Second Farm	49	63.3	10.2	0.0	24.5	2.0	0.0	0.0
3	Third Farm	10	70.0	0.0	0.0	30.0	0.0	0.0	0.0
4	Growing Crops	39	38.5	20.5	7.7	28.2	0.0	2.6	2.6
5	Home	94	83.0	3.2	0.0	10.7	2.1	0.0	1.1
6	Other City Lots	10	80.0	0.0	0.0	10.0	10.0	0.0	0.0
7	Bus. Real State	10	20.0	0.0	0.0	70.0	0.0	10.0	0.0
8	Second House	2	50.0	0.0	0.0	0.0	50.0	0.0	0.0
9	Summer Cottage	2	50.0	0.0	0.0	0.0	50.0	0.0	0.0
10	Rental Property	11	72.7	0.0	0.0	18.2	9.1	0.0	0.0
11	Real Property	6	66.7	0.0	0.0	33.3	0.0	0.0	0.0
12	Trucks	72	16.7	5.6	0.0	75.0	0.0	2.8	0.0
13	Tractors	81	32.1	4.9	0.0	60.5	0.0	1.2	1.2
14	Other Machinery	65	27.7	6.2	0.0	63.1	0.0	1.5	1.5
15	Equipment	40	17.5	10.0	0.0	70.0	0.0	0.0	2.5
16	Livestock	74	31.1	8.1	0.0	56.8	0.0	2.7	1.4
17	Severed Crops, & Comm. Feed	33	24.2	15.2	0.0	54.6	0.0	3.0	3.0
18	Bus. Assets	17	35.3	5.9	0.0	47.1	0.0	5.9	5.9
19	Stock	64	54.7	1.6	7.8	31.3	3.1	0.0	1.6
20	Bonds	53	71.7	0.0	5.7	18.8	3.8	0.0	0.0
21	Sav. Accts. & Time Certif.	91	81.3	0.0	4.4	11.0	3.3	0.0	0.0
22	Checking Account	173	89.0	0.0	1.7	8.7	0.0	0.0	0.6
23	Safety Deposit Box	75	61.3	0.0	0.0	4.0	0.0	0.0	34.7
24	Automobile #1	168	39.3	6.5	0.6	50.0	3.0	0.0	0.6
25	Automobile #2	10	20.0	40.0	0.0	0.0	40.0	0.0	0.0
26	Boat, Airplane, etc.	15	13.3	6.7	0.0	73.3	6.7	0.0	0.0
27	Truck (nonfarm)	16	6.3	0.0	0.0	93.8	0.0	0.0	0.0
28	Housetrailer	4	50.0	25.0	0.0	25.0	0.0	0.0	0.0
29	Jewelry & Antiques	10	40.0	0.0	0.0	30.0	30.0	0.0	0.0
30	Sales Cont. & Mortgage	17	35.3	5.9	0.0	41.2	5.9	5.9	5.9
31	Life Ins. & Employee Benefits	137	0.7	0.0	0.0	98.5	0.7	0.0	0.0
32	Other Personal Property	9	22.2	11.1	0.0	66.7	0.0	0.0	0.0
33	Household Goods	127	70.9	3.1	0.0	19.7	0.8	0.0	5.5

* The classification "Multiple Ownership" was arbitrarily used whenever more than two parties were co-owners. Many of these would also be joint tenancies in all likelihood.

APPENDIX II

Holding Pattern by Value (All Property)

VALUE ($)	Joint Tenancy	Tenancy in Common	Multiple Ownership*	Sole Ownership by Husband	Sole Ownership by Wife	Other	No Response	Total
0-500	169	4	4	97	8	1	0	193
501-1000	97	11	1	74	3	0	1	187
1001-2000	87	11	2	96	5	1	2	205
2001-3000	122	11	2	86	4	1	3	229
3001-5000	74	6	3	81	4	1	4	173
5001-10,000	65	14	2	70	1	4	4	160
10,001-20,000	74	8	4	66	2	3	0	157
20,001-40,000	41	2	0	29	2	0	0	74
40,001-60,000	24	2	0	20	1	0	0	47
60,001-80,000	15	3	0	9	0	0	0	27
80,001-120,000	6	3	0	6	1	0	1	17
120,001 and over	2	0	0	0	0	0	0	2

* The classification "Multiple Ownership" was arbitrarily used whenever more than two parties were co-owners. Many of these would also be joint tenancies in all likelihood.

APPENDIX III

Holding Patterns by Age Groups

	AGE								
How Held	Under 30	30-34	35-39	40-44	45-49	50-54	55-59	60 & over	Total
Joint Tenancy	47	100	142	137	81	89	125	112	833
Tenancy in Common	3	4	9	11	18	4	19	8	76
Multiple Ownership	0	3	1	1	1	3	1	9	19
Sole Ownership by Hus.	32	63	82	118	67	127	70	90	649
Sole Ownership by Wife	1	5	5	3	3	4	4	7	32
Other	0	0	3	0	1	2	0	5	11
No Response	3	3	5	13	3	5	10	4	46

APPENDIX IV

Holding Patterns by Occupation (All Property)

		OCCUPATION								
How Held	Total	Professional	Farmer	Self-Employed	Employer-Bus.	Skilled	Unskilled	Housewife	Retired	Other
Joint Tenancy	833	41	392	63	39	160	65	3	63	7
Tenancy in Common	76	1	60	3	0	6	0	2	2	2
Multiple Ownership	19	3	9	2	0	2	1	0	2	0
Sole Ownership by Husband	649	31	388	56	28	78	30	3	20	4
Sole Ownership by Wife	32	6	12	3	2	2	3	0	4	0
Other	11	0	5	0	0	0	0	0	0	0
No Response	46	5	29	3	6	3	3	0	0	3

APPENDIX V

Sources of Influence on Holding Form

		SOURCE OF INFLUENCE														
How Held	Total	No Response	Attorney	Banker	Real Estate Agent	Merchant	Automobile Salesman	Insurance Agent	Loan Company	Relative	County Agent	Friend	Book or Mag. Article	Stock Broker	Seller	Other
Joint Tenancy	833	682	51	52	7	0	1	3	2	4	8	9	9	2	1	2
Tenancy in Common	76	61	12	2			1									
Multiple Ownership	19	16	2	1												
Sole Ownership by Husband	649	630	17	1												1
Sole Ownership by Wife	32	29	2	1												
Other	11	7	4													
No Response	46	46														

APPENDIX VI

Holding Patterns by Co-owner Relation (All Property)

		RELATION					
HOW HELD	Total	Spouse	Child	Sibling	Other Relative	Bus. Assoc.	Other
Joint Tenancy	833	13	794	17	6	3	0
Tenancy in Common	762	2	51	1	22	0	0
Multiple Ownership	19	4	11	3	0	0	1
Sole Ownership by Husband	649	636	13	0	0	0	0
Sole Ownership by Wife	32	32	0	0	0	0	0
Other	11	2	0	5	0	2	2
No Response	46	44	1	0	1	0	0

APPENDIX VII*

Auto Ownership by Age Group

	Total	Under 30	30-34	35-39	40-44	45-49	50-54	55-59	60 & over
Joint Tenancy	66	3	6	14	9	5	9	11	9
Tenancy in Common	11	1	1	1	2	2	2	2	0
Multiple Ownership	1	0	0	0	1	0	0	0	0
Sole Ownership by Husband	84	7	13	9	13	9	10	11	12
Sole Ownership by Wife	5	0	1	1	0	0	0	1	2

Auto Ownership by Occupation

	Total	Prof.	Farmer	Self-Empl.	Empl.-Bus.	Skilled	Unskilled	Housewife	Retired	Other
Joint Tenancy	66	5	27	7	5	11	4	0	6	0
Tenancy in Common	11	0	5	1	0	2	0	1	0	2
Multiple Ownership	1	0	1	0	0	0	0	0	0	0
Sole Ownership by Husband	84	4	42	4	5	16	9	0	3	0
Sole Ownership by Wife	5	1	1	0	0	0	1	0	2	0

* The tables above report the ownership patterns for only the first automobile reported by any respondent. The ownership pattern for second cars closely parallels the information presented above.

APPENDIX VIII

Auto Ownership by Value

	Total	0-500	501-1000	1001-2000	2001-3000	3001-5000	5001-10,000	10,001-20,000
Joint Tenancy	64	7	18	20	16	2	0	1
Tenancy in Common	11	0	3	4	4	0	0	0
Multiple Ownership	1	0	1	0	0	0	0	0
Sole Ownership by Husband	84	19	20	30	15	0	0	0
Sole Ownership by Wife	4	0	0	1	3	0	0	0
Other								

APPENDIX IX

Holding Patterns of Farm Chattels

		HOW HELD					
Type of Property	Total	Joint Tenancy	Tenancy in Common	Sole Ownership by Husband	Sole Ownership by Wife	Other	No Response
Trucks	72	12	4	54	0	2	0
Tractors	81	26	4	49	0	1	1
Other Machinery	65	18	4	41	0	1	1
Equipment	40	7	4	28	0	0	1
Livestock	74	23	6	42	0	2	1
Severed Crops	33	8	5	18	0	1	1

APPENDIX X

Holding Patterns by Co-owner Relation (Farm Chattels*)

	Total	Spouse	Child	Sibling	Bus. Assoc.	No Response
Joint Tenancy	94	84	6	0	0	4
Tenancy in Common	27	15	0	11	0	1
Multiple Ownership	8	0	5	1	2	0
Sole Ownership by Husband	167	—	—	—	—	—
Sole Ownership by Wife	0	0	0	0	0	0
Other	0	0	0	0	0	0
No Response	4	0	0	0	0	4

* The table consolidates the information collected separately regarding farm trucks, tractors, machinery, equipment, livestock, and severed crops.

APPENDIX XI

Holding Patterns by Co-owner Relation (Household Goods)

		RELATIONSHIP			
How Held	Total	No Response	Spouse	Child	Sibling
Joint Tenancy	90	0	90	0	0
Tenancy in Common	4	0	3	0	1
Sole Ownership by Husband	25	23	2	0	0
Sole Ownership by Wife	1	1	0	0	0
Other	0	0	0	0	0
No Response	7	7	0	0	0

APPENDIX XII

Holding Patterns by Value (Household Goods)

		VALUE						
HOW HELD	Total	No Response	0-500	501-1000	1001-2000	2001-3000	3001-5000	5001-10,000
Joint Tenancy	90	3	0	9	18	44	14	2
Tenancy in Common	4	0	0	0	1	3	0	0
Sole Ownership by Husband	25	0	1	1	5	9	8	0
Sole Ownership by Wife	0	0	0	0	0	0	1	0
No Response	7	0	0	1	1	2	2	1

APPENDIX XIII

Holding Patterns by Co-owner Relation (Corporate Securities)

HOW HELD	Total	Spouse	Child	Sibling	Other Relative	Bus. Assoc.	No Response
Joint Tenancy	35	32	2	1	0	0	0
Tenancy in Common	1	0	0	1	0	0	0
Multiple Ownership	5	3	1	0	0	1	0
Sole Ownership by Husband	20	1	0	0	0	0	19
Sole Ownership by Wife	2	0	0	0	0	0	2
No Response	1	0	0	0	0	0	1

APPENDIX XIV

Holding Patterns by Value (Corporate Securities)

HOW HELD	VALUE									
	Total	0-500	501-1000	1001-2000	2001-3000	3001-5000	5001-10,000	10,001-20,000	20,001-40,000	No Response
Joint Tenancy	35	10	3	8	5	6	2	1	0	0
Tenancy in Common	1	0	1	0	0	0	0	0	0	0
Multiple Ownership	5	1	0	1	0	1	1	0	0	1
Sole Ownership by Husband	20	6	1	2	3	1	1	3	0	1
Sole Ownership by Wife	2	0	0	1	0	1	0	0	0	0
No Response	1	0	0	0	0	0	1	0	0	0

APPENDIX XV

Holding Patterns by Co-owner Relation (Bonds)

HOW HELD	Total	Spouse	Child	Sibling	Other Relatives
Joint Tenancy	38	30	5	1	2
Tenancy in Common	0	0	0	0	0
Multiple Ownership	3	2	1	0	0
Sole Ownership by Husband	10	0	0	0	0
Sole Ownership by Wife	2	0	0	0	0

APPENDIX XVI

Ownership Pattern by Value
(Checking Accounts)

	VALUE								
HOW HELD	0-500	501-1000	1001-2000	2001-3000	3001-5000	5001-10,000	10,001-20,000	20,001-40,000	40,001-60,000
Joint Tenancy	154	4	96	21	12	12	7	2	0
Tenancy in Common	0	0	0	0	0	0	0	0	0
Multiple Ownership	3	0	2	0	0	0	0	0	1
Sole Ownership by Husband	15	1	3	4	5	2	0	0	0
Sole Ownership by Wife	0	0	0	0	0	0	0	0	0

APPENDIX XVII

Holding Patterns by Co-owner Relationships
(Checking Accounts)

	RELATION				
HOW HELD	Total	Spouse	Child	Sibling	No Response
Joint Tenancy	154	151	1	1	1
Tenancy in Common	0	0	0	0	0
Multiple Ownership	3	1	0	0	2
Sole Ownership by Husband	15	0	0	0	15
No Response	1	0	0	0	1

Holding Patterns by Co-owner Relationship
(Savings Accounts)

	RELATION				
HOW HELD	Total	Spouse	Child	Sibling	No Response
Joint Tenancy	74	73	0	1	0
Tenancy in Common	0	0	0	0	0
Multiple Ownership	4	3	0	0	1
Sole Ownership by Husband	10	0	0	0	10
Sole Ownership by Wife	3	0	0	0	3

APPENDIX XVIII

Reasons for Holding Personal Property

	Age	Nature of Property	Value of Property	Size of Property	Family Situation	Occupation	Reduce Income Taxes	Avoid Death Taxes	Ease of Transfer	Downpayment Source	Debt	Cultural Background	Advice of Another	Printed Form	Lending Institution	Took Under Will
Joint Tenancy	31	51	3	14	304	21	13	119	230	6	0	34	73	114	0	1
Tenancy in Common	0	7	1	0	26	1	0	6	7	0	0	0	9	0	0	2
Multiple Ownership	2	0	0	0	0	0	0	1	5	0	0	0	0	3	0	0
Sole Ownership by Husband	0	1	0	0	7	4	0	6	6	0	0	4	5	0	0	0
Sole Ownership by Wife	0	0	0	0	0	0	0	0	2	0	0	0	0	0	0	0
No Response	0	0	0	0	1	0	0	2	2	0	0	0	0	0	0	0